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REPORTS

OF

518

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT OF ALABAMA,

DIRECT

DEC. TERM, 1878.

J. C. COMPTON

BY

THOMAS G. JONES,
STATE REPORTER.

40621

VOL. LXI.

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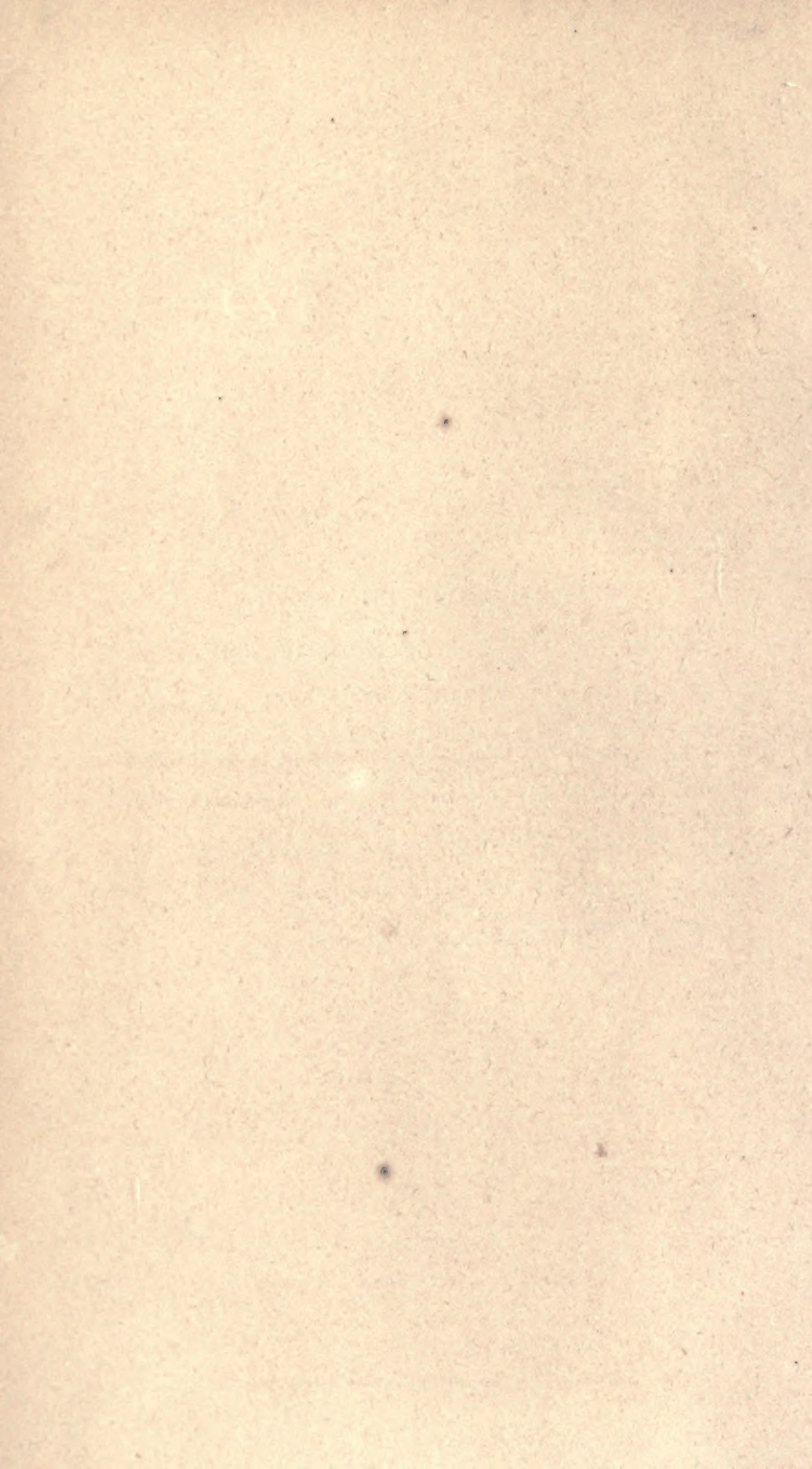


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CASES
IN THE
SUPREME COURT OF ALABAMA.

DECEMBER TERM, 1878.

Toney v. State.

Indictment for Keeping, or Exhibiting a Gaming Table.

1. "*Table for gaming*;" what constitutes.—Any table kept and used for gaming, is "a table for gaming," within the meaning of the statute (Code, § 4208), though it has no peculiar devices or appliances, and is not necessarily used in playing any particular game.

APPEAL from City Court of Montgomery.

Tried before Hon. JOHN A. MINNIS.

The appellant, Toney, was convicted under an indictment which charged that he kept or exhibited a gaming table for gaming, or was interested or concerned in the keeping or exhibiting thereof. Sam Tyson, a witness for the State, testified that within twelve months before the finding of the indictment, the defendant was the proprietor of a cellar or room, located under a building in the city of Montgomery, and that he kept said room or cellar for the purposes of gaming; that in said room he kept an ordinary pine table, upon which the game of "chuckeluck" was played, and that said game was played as follows: "Six cards were laid upon the table, of denomination, ace, duce, tray, four, five and six of diamonds, or any other suit that might be selected from the pack; that three dice were thrown from a dice box, and if the number on the dice thrown corresponded with the card bet on, the player would win; if, however, the dice did

[Toney v. State.]

not, he would lose, and the wager would go to the defendant; that there were no devices or figures of any kind marked on the table, which was covered with an ordinary cloth, having no devices or figures on it, and that the game could have been played as well without, as with a table, and that said table was not necessary to the game in question."

Joe Rainey, another witness for the State, testified in substance the same as the foregoing witness, with the exception that he stated that he never saw in said room any table other than one formed by two pine boards nailed across the end of an upright stick, and another formed by two rough planks placed against and supported by the two corners of the room; and that he frequently visited said room. He further testified that defendant kept watermelons in said cellar for sale.

This was all the evidence, and the court, at the request of the solicitor, charged the jury, if they believed all the evidence beyond a reasonable doubt, they must find the defendant guilty as charged; and the defendant excepted. The defendant then requested, in writing, the following charges:

1. "In order to find the defendant guilty the jury must believe from the evidence, beyond a reasonable doubt, that the defendant kept or exhibited a gaming table for gaming, or that he was interested or concerned in the keeping or exhibiting thereof; and the evidence must further show, beyond a reasonable doubt, that the table was of such a character or kind as to form a part of the game played thereon, or for which it was kept or exhibited, and that it was an essential part of the game.

2. "Unless the evidence shows that defendant kept or exhibited, or was interested or concerned in the keeping or exhibition of a gaming table for gaming, of such a character as to form an essential part of the game for which it was kept or exhibited, then the jury must find the defendant not guilty.

3. "If the evidence only shows that the table with which the defendant is charged with keeping or exhibiting was an ordinary pine top table, or was composed of two or three rough boards set up in a horizontal position, and in no wise connected with or forming an element of the game played thereon, or of any game for which it was kept or exhibited, then the jury must acquit.

4. "If the jury believe the evidence they must find the defendant not guilty."

The court refused these charges, and the defendant duly excepted.

[Toney v. State.]

The charge given, and the refusal to charge as requested, are now assigned as error.

JOHN GINDRAT WINTER, for appellant.—The record raises the question whether a table which forms no part of the game played, and which is not an element or ingredient of the game, is the kind of table prohibited by the statute. Section 4207 of the Code forbids the playing of any game with cards, &c., at any of the places mentioned, and subsequent sections forbid betting at any of the games prohibited by this section, or at any gaming table prohibited by section 4208. It will be seen that each and all of these statutes draw the distinction between the ordinary betting or playing at cards and a gaming table; hence it may well be inferred that this distinction was purposely drawn. If betting at cards or dice, or renting a room for gaming purposes, would include renting for the purpose of exhibiting a gaming table, why insert the clause with reference to gaming tables? The legislature must have had reference to a peculiar kind of table, when it so frequently draws the distinction between ordinary betting with cards, and exhibiting a gaming table. The penalty for the different offences is different, and it seems the evident intent of the law to make a distinction.

H. C. TOMPKINS, Attorney-General, *contra*.—The statute denounces as a crime the being interested or concerned in the keeping or exhibiting any table *for gaming*.

The gambling here, necessarily required the use of the table or something in the place of it. The law does not say that the table shall be an essential part of the game; it denounces the keeping of a *table for gaming*. Perhaps there is not a single game played with a table but what could also be played on a floor or even on the ground. The court neither erred in giving the charge asked by the State, nor in refusing the charges asked.—See *Miller v. State*, 48 Ala. 122.

BRICKELL, C. J.—The offence denounced by the statute under which the indictment was found, is the keeping or exhibiting, or being interested or concerned in keeping or exhibiting any table for gaming, of whatsoever name, kind, or description, not regularly licensed under the laws of this State.—Code of 1876, § 4208. It is not a *gaming table*, if there be such, as distinguished from other tables, that alone falls within the prohibition of the statute. Nor is the char-

[Daniel v. State.]

acter of the table, whether it contains devices, or any appliances, adapted and essential to particular gaming, an element of the offence. It is the *use* to which the table is appropriated, and the absence of a license under the laws of the State for that *use*, which renders the keeping or exhibition, or concern or interest in its keeping or exhibition, indictable. It may be that the particular table, or substitute for a table, kept and exhibited by the appellant was not a part of, or essential to the playing of *chuckeluck*; but if the defendant kept and exhibited it for use in the playing of that game, he was guilty as charged.

The statute is very general in its terms, and so of necessity, to meet and suppress the evil against which it is directed. Former statutes had descended to particulars, as tables for *faro*, *roulette*, &c., not meeting all the technicalities of the professional gamester; or slight changes in the names, or in the mode of playing games, were resorted to, and some times successfully, for the purpose of evading them. Under the present statute, the only inquiry for the court and jury, is, into the *use* for which the table is kept or exhibited. If that be gaming, the statute is violated, unless a license is shown.

There was no error in the rulings of the City Court, and its judgment is affirmed.

Daniel et al. v. State.

Indictment for Fraudulent Packing of Cotton.

1. *Fraudulent packing of cotton; what not necessary to constitute offence denounced by section 4398 of Code.*—To constitute the statutory offence of fraudulently packing or baling cotton (Code, § 4398), it is not essential that the sand or other worthless foreign substance, fraudulently baled or packed with the cotton, should be put into the interior of the bale and concealed by surrounding or plating with clean cotton, so as not to be detected by the ordinary modes of sampling; nor does it matter whether such worthless foreign substance is put in the cotton while in the gin-house, or at the press while the cotton is being packed in bales.

2. *Offence, how must be charged.*—Where a statute creating an offence, declares that it may be committed by certain specified acts or means, or by other generic acts or means which are not described, an indictment under the statute for an act other than those particularized, or charging such acts in the alternative with the acts specified in the statute, must charge the acts which the statute does not specifically define, in unambiguous words belonging to the plain and proper language of the country, and not in slang words.

[Daniel v. State.]

or vulgarisms, or words used in a technical sense in some peculiar employment or business.

3. "*Sand-packing*," use of term in indictment, does not render it ambiguous.—In view of the general concern of the people of the State in raising cotton, preparing it for market, and selling and purchasing it, the words "*sand-packing*" have become so generally understood among the people, that they can not be said to be ambiguous or merely technical; and the use of these words in an indictment for the false packing of cotton, will not render it ambiguous, or insufficient.

APPEAL from the Circuit Court of Barbour.

Tried before the Hon. HENRY D. CLAYTON.

The appellants were convicted under an indictment which charged that they "did fraudulently pack or bale one bale of lint cotton, the property of Hester Ann Jones, by plating or otherwise, to-wit, by *sand-packing*," &c.

On the trial, it was shown that the defendants were the owners of a public gin, which they ran for toll in Barbour county, in this State. Hester Jones testified "that in the fall of 1877, she carried seed-cotton to said gin, which was not 'storm cotton,' and was good cotton, and delivered it to be ginned and baled, and paid the toll on the same; that sometime thereafter, she sent one of her sons to said gin and received a bale of cotton which had been ginned and packed at said gin, and which was delivered to her son by one of the defendants, as her cotton; that she carried the bale thus received to Troy, where it was sampled by one Jackson, a cotton-buyer, and that the sample contained several ounces of sand; that the sand fell out of said sample as it was drawn out, and was coarse sand; that the sample contained so much sand that the cotton was not worth more than five cents a pound, when but for the sand it would have been worth nine cents a pound."

Jackson testified that on account of the quantity of sand in the sample, he had the bale of cotton cut open and the sand beaten out, and that the sand was all through the bale, as it was in the sample. He further testified that in his opinion there were seventy pounds of sand in the bale.

The defendants offered the testimony of a number of witnesses tending to show that during the time the cotton of Hester Jones was at the gin, there were a great many lots of what was known as "storm cotton" in the gin-house, brought there by various persons, and that when the bale of cotton was delivered to the son of Hester Jones, there were five or six other bales lying near said bale, and that there were no marks to designate which was the bale of Hester Jones.

[Daniel v. State.]

The appellant introduced two witnesses, who testified that they aided in ginning and packing the identical cotton sent to the gin-house by Hester Jones, and that no sand was put in said bale, or in the cotton before it was baled. The defendants introduced witnesses who testified that there were more than two storms in the neighborhood in which the cotton was raised, and that the land on which the Jones bale was raised was poor and sandy, and the stalks did not average more than eighteen inches in height; that storm cotton contained a great deal of sand, which was beaten by the rain into the cotton open on the lower limbs, and such as had fallen out on the ground; and that many bales of storm cotton were ginned and baled during the season of 1877, which contained more than one hundred pounds of sand after being baled.

The court charged the jury "that if the defendants put the sand into the lint cotton, either in the lint-room, or while being carried to or put in the screw-box, while being baled or packed, for the purpose of defrauding Hester Ann Jones, or any one else who might purchase the cotton, the defendants were guilty as charged."

This charge was excepted to by the defendants, who then requested the court to give the following charges, which were in writing: "2. If the evidence shows that the bale of cotton contained sand about alike in quantity all through the bale, from the surface to the edge of the bale, then said cotton was not fraudulently sand-packed or baled." 3. "That in order to constitute the offence of fraudulently sand-packing or baling cotton, the proof must show conclusively that the sand was put in the bale in such a way as to convince the jury beyond reasonable doubt that the purpose of the defendants was to conceal the sand from being seen or detected so near the outside of the bale, as it could not be reached by the ordinary test of sampling." 3½. "That unless the proof satisfied the jury that the sand was purposely put so deep in the bale that it could not be seen or detected by sampling in the ordinary way, then the bale of cotton was not fraudulently packed or baled." The court refused to give either of these charges, and defendants excepted.

The charge given, and the refusals to charge as requested, are now assigned as error.

D. M. SEALS, for appellants.—The indictment is defective, failing to describe with legal certainty how the fraudulent baling was done. It alleges the offence in the language of

[Daniel v. State.]

the statute "by plating or otherwise," and adds, to-wit, by "sand-packing." How "sand-packed?" What is the meaning of *sand-packing*? The charge is too vague and indefinite. The charges asked should have been given. Their refusal certainly ignored the main element which constitutes the gist of the offence—namely, a purpose or intent of the defendants to pack or bale the cotton fraudulently. It must be done with an *intent to conceal from, and deceive a purchaser or dealer* as to the quantity and condition of the cotton in the bale; the particular manner of baling the cotton, the particular manner of putting, placing or arranging the cotton in the bale, so that no one could detect or observe the deception, except by something more than the ordinary means and tests employed in the market by dealers and purchasers, must exist to constitute the fraudulent baling of cotton, within the meaning of the statute.

H. C. TOMPKINS, Attorney-General, *contra*.—There can be no doubt as to the meaning of the phrase, "sand-packing." It means *packed with sand*; and there can be no doubt that the defendants were clearly informed of what was charged. The charge given by the court is clearly correct. It asserts that the statute is violated, if the mixing was done in either of the places, if done with the fraudulent intent; and certainly to hold otherwise would be to so limit the operation of the law as to entirely defeat its purposes. The *gravamen* of the crime is the packing with the fraudulent intent. The charges refused invaded the province of the jury; for while it is true that the circumstance, that the sand was evenly distributed throughout the bale, might be a circumstance which would tend to repel the presumption of fraudulent intent, the assertion as matter of law that such a circumstance repelled the presumption of fraud, clearly infringes on the right of the jury to determine what the facts prove.

MANNING, J.—The statute (§ 4398 of the Code of 1876) denouncing a penalty against "any person who fraudulently packs or bales any cotton by plating, or otherwise," is undoubtedly violated when persons who gin cotton for toll, with intent to defraud the owner of seed-cotton sent to them to be ginned or packed, or to defraud a purchaser thereof, mix sand or other worthless foreign substances with the cotton when ginned, in the bales into which it is packed. It is not necessary in order to make out the offence, to show, that the sand is put into the interior of the bale and

[Daniel v. State.]

concealed by surrounding or plating it with clean cotton; nor does it matter whether the sand is put into the cotton while in the gin-house, or being carried out to the press, or at the press when packed or about to be packed into bales. The charges of the circuit judge are not inconsistent with these views, and were not erroneous; nor did he err in refusing to give to the jury the charges 2, 3 and $3\frac{1}{2}$ that were asked on behalf of defendants.

About the indictment, we have had some difficulty. It charges that appellants "did fraudulently pack or bale one bale of lint cotton, the property of Hester Ann Jones, by plating or otherwise, to wit, *by sand-packing*," &c.

When a statute creating an offence declares that it may be committed, by certain specified acts or means, "or otherwise," the acts otherwise or different from those specified and which are to be put in evidence, must be so described or alleged in the indictment, that the court shall be able to see whether or not they constitute the offence.—*Danner v. The State*, 54 Ala. 127. If in the latter of such alternative averments, the acts or means by which the offence is supposed to have been committed, are not mentioned,—it may turn out that the grand jury, in finding the indictment, and the petit jury, in their verdict sustaining it, have imputed to certain acts a character of criminality which does not belong to them in the eyes of the law, and upon which the judge would not be justified in passing sentence against the accused.

It follows, of course, that in alleging the acts assumed to be criminal, they should be set forth in unambiguous words, understood by court and jury and by people generally; not in slang words or vulgarisms, or words used in a technical sense in some peculiar employment or business, but in words belonging to the plain and proper language of the community. We have hesitated over the question whether the expression "sand-packing" is not of a technical character, and as such not generally known in popular use. But considering how generally the people of this State are concerned in the raising of cotton, and in preparing it for market and in the sale and purchase of it—we think the meaning of "sand-packing" has become so generally understood that we can not say the indictment is bad for ambiguity. It would have been better to have alleged that the fraudulent packing of the cotton was done by intermixing or putting sand with the cotton in the bale, with the intent, &c.

Solicitors should use more thought and care in preparing

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the brief indictments which are authorized by our statutes.
Let the judgment of the Circuit Court be affirmed.

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Indictment for Wilfully and Maliciously Trespassing on Land, &c.

1. *Trespass to realty; section 4417 of Code construed.*—Section 4417 of the Code, with reference to trespass to realty. makes offenses out of certain acts which were mere civil trespasses at common law, and divides these offenses into two classes.

2. *Same.*—The first clause of the section punishes wilful and malicious trespasses on the lands of another, “by cutting down or destroying wood or timber growing thereon, or severing from the freehold any produce thereof,” &c.; and to constitute the offense, the prohibited acts must be done wilfully and maliciously, with malice directed to the owner of the premises—it is not necessary that there should be any *asportavit*, or that the trespass be committed *lucri causa*.

3. *Same.*—The second clause, providing for the punishment of any one taking or carrying away from the freehold any thing thereto attached, under such circumstances as render the trespass a larceny. if the thing severed and taken away were personal property, was intended to enlarge the operation of the statutes for the suppression of larceny; and to constitute an offense under this branch of the statute, felonious intent, or act done *causa lucri*, is a fundamental inquiry, while malice to the owner is not.

APPEAL from City Court of Montgomery.

Tried before Hon. JOHN A. MINNIS.

The appellant, Dock Johnson, was convicted on an indictment, charging in a single count, that he “wilfully and maliciously trespassed upon the lands of William R. Westcott, by cutting down or destroying a quantity of wood or timber, at the time growing thereon,” against the peace, &c. On the trial, the State introduced David Westcott, who testified that, within twelve months before the finding of the indictment, he found defendant on some wood land belonging to William R. Westcott, loading a one-horse wagon with sticks of fire-wood which had been freshly cut; that he asked defendant if he had permission to take the wood, and that defendant told him he had not, and then asked witness not to inform on him. Witness had several times previously seen defendant coming out of said woods with his wagon loaded with fire-wood.

William R. Westcott was then introduced, and testified

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that he had never given defendant permission to cut or haul wood from his place.

This was all the evidence. The defendant requested the following written charges:

"1. In order to find that malice existed towards Mr. William R. Westcott, there must be some proof thereof, and they are not authorized to presume malice unless the facts clearly justify it.

"2. In order to find that malice existed to the owner, Wm. R. Westcott, there must be some proof thereof; and the jury are not authorized to presume malice, unless the facts and circumstances brought out by the evidence justifies such finding, beyond all reasonable doubt.

"3. Unless the jury find beyond all reasonable doubt that the wood was cut wilfully and maliciously, they can not find the defendant guilty; and if they have a reasonable doubt as to whether he did it wilfully and maliciously, or with the intent simply to convert the wood to his own use, they must find the defendant not guilty.

"4. The jury must find beyond a reasonable doubt that malice existed toward the owners of the land, and if they have a reasonable doubt of this, they must acquit.

"5. If the jury believe the evidence, they must find the defendant not guilty."

The court refused each of these charges, and the defendant duly excepted. Their refusal is now assigned as error.

JOHN GINDRAT WINTER, for appellant.—The statute, or part of the statute, (Code of 1876, § 4417,) under which this indictment was found, requires that the cutting should be done with both a wilful and malicious intent. The words "*wilfully*" and "*maliciously*" are coupled by the conjunction "*and*." The charges assert the proposition, that unless the evidence establishes both of these ingredients, the jury must acquit; or, if the jury have a reasonable doubt as to whether the act was done wilfully and maliciously, or *simply* to convert the wood to his own use, they must find the defendant not guilty. The indictment charged malice; and that malice must exist towards the owner, and the evidence utterly fails to show any malice on the part of the defendant to Wm. R. Westcott, or any other person.—See *Northcott v. State*, 43 Ala. 330; *Johnson v. State*, 37 Ala. 457. These cases arose under a similar statute, and assert principles which are directly applicable to the case at bar.

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H. C. TOMPKINS, Attorney-General, *contra*.

STONE, J.—Section 4417 of the Code of 1876 converts into crimes certain acts which, at common law, were mere civil trespasses. It is divided into two classes. The one consists in wilfully and maliciously committing a trespass on the lands of another, “by cutting down or destroying any wood or timber growing thereon, or by severing from the freehold any produce thereof, or any property or thing thereto attached.” It will be observed that this offense, the other ingredients being present, is complete, without the *asportavit*. The controlling words are *wilfully* and *maliciously*. No matter how inexcusable the trespass, the criminal offense is not made out, unless the act is wilfully and maliciously done. Wilfully is a strong word, much stronger than the word intentionally.—See *Mitchell v. The State*, 60 Ala. 26. It means, governed by the will, obstinate, perverse. Maliciously, in this sentence, is still more significant and controlling. It means, with ill-will, malevolence, grudge, spite, wicked intention, enmity. And this ill-will can not exist without an object. It must be aimed at some one; and assimilating this offense to malicious mischief, which it very much resembles, we hold the malice the culprit entertains must be directed to the owner of the premises.—*Northcott v. The State*, 43 Ala. 330; *State v. Price*, 7 Ala. 728; *Johnson v. The State*, 37 Ala. 457. We think this clause of the statute was intended to enlarge the provisions of the criminal law against malicious mischief, so as to make them embrace growing timber and other products of the soil, and other things attached to, and part of the freehold, as well as certain enumerated chattels. Hence, any person who wilfully and maliciously cuts down or destroys growing timber on another’s land or freehold, or severs any produce thereof, or property or thing thereto attached, is guilty of the offense, without any reference to the gain or profit to accrue to the offender. His purpose may have been destruction of the property. It is the malice or ill-will of the deed, which constitutes the criminality.

The second branch of the statute enlarges the operation of the statutes made for the suppression of larceny. This offense, at common law, could only be committed by feloniously taking and carrying away the personal goods of another. Any thing attached to, and thus part of the freehold, could not be its subject, unless it had been first severed, and afterwards feloniously taken and carried away. Under this stat-

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ute, "any person who severs and carries away from the freehold, any property or thing thereto attached, under such circumstances as would render the trespass a larceny, if the thing severed and carried away personal property," is guilty of the public offense it denounces. Felonious intent is a fundamental inquiry under this branch of the statute, while malice is not an ingredient of the offense. The first branch of the section intends to prevent the destruction or injury of the property described, when done from ill-will or malice to the owner; the latter branch intends to punish and prevent the severing and carrying away such property, when done feloniously, at *causa lucri*. The particular intent which characterizes the one offense, is entirely unlike that which distinguishes the other.

The indictment in the present case contains only one count, and one specification of offense, to-wit: that the defendant "wilfully and maliciously trespassed on the lands of W. R. W. by cutting down or destroying a quantity of wood or timber at the time growing thereon." We have shown above that to constitute this offense, there must be malice against the owner. Several of the rulings of the City Court are not reconcilable with these views.

Reversed and remanded. Let the prisoner remain in custody until discharged by due course of law.

Lee et ux v. Campbell.

Action against Husband and Wife to subject Statutory Estate of Wife.

1. *Liability of wife's statutory estate for necessities; effect of admissions by husband.*—Acts or admissions of the husband will not prevent or remove the bar of the statute of limitations, as to the remedy against the statutory estate of the wife, for articles of comfort and support of the household.

2. *Same; what are necessities, in the meaning of the statute.*—Under the statute in force in the year 1863, the statutory estate of the wife was not liable except for food, raiment, habitation, medical assistance, and medicine,—necessaries for which the husband would be responsible at common law, though supplied without his knowledge or consent.

3. *Same.*—A smoke-house, carriage-house, and fencing, are not necessities within the meaning of the statute.

APPEAL from the Circuit Court of Sumter.

Tried before Hon. L. R. SMITH.

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Appellee, Campbell, on the 15th day of September, 1871, brought this action against James Lee and Susan, his wife, to subject her statutory estate, for work and labor done in the year 1863, in repairing fencing, and building a carriage-house and smoke-house, about the premises on which appellants resided, which formed part of her statutory estate.

Issue was joined on the pleas, among others, of payment, statute of limitations of three years, and the general issue.

It was proved that the estate sought to be condemned, was at the time of doing the work, and continued, up to the trial, to be, the statutory estate of said Susan, and that she was then and still is the wife of her co-defendant, James. The plaintiff testified that he did the work in the year 1863, at the instance of the husband; that it was reasonably worth the sum charged; that "Lee and his wife lived in good style, and the work done was suitable to their degree and condition in life." In answer to a question whether the defendants had seen the account, at any time before the suit, or in any way admitted its correctness, the plaintiff answered that the husband had seen the account and given his promissory note for it. The defendant, Susan, objected to the answer, and moved to rule out the testimony, on the ground that the admissions of the husband were not binding on her; but the objection and motion to exclude were both overruled, and she excepted. The husband testified, that at the time the work was done, "I had on the old place, within three hundred yards, stables and smoke-house, and a shed under which to place the carriage. The articles built by the plaintiff were not necessary for the comfort or support of my family, but were built by contract with me, because I desired better buildings at a more convenient point."

This was substantially all the evidence. Thereupon the court charged the jury, "if they found from the evidence that the work was done by the plaintiff, and the price was reasonable and customary, and that the work so done was necessary for the comfort and support of the household, and suitable to the degree and condition in life of the defendants, and for which the husband would be liable at common law, the separate statutory estate of Mrs. Lee was liable therefor."

The court further charged the jury, "if they believed from the evidence that the defendant, James Lee, admitted the correctness of the account sued on, and executed his note therefor, it then became a stated account, and the statute of limitations of three years did not apply, even though the

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jury should find that Mrs. Lee knew nothing of the admissions, and did not herself admit the correctness of the account. The liability is fixed by law, not by contract with the wife, and the admissions of the husband bind her."

To the giving of each of these charges, exception was duly reserved. The defendants, thereupon, requested the court, in writing, to charge the jury as follows: "If there was a place to put the carriage, and a smoke-house on the place, the fact that the husband built a finer or more convenient one, does not make the wife's statutory estate liable. 2d. The building of a smoke-house, carriage-house, and fencing, were not such articles of comfort and support as would make the wife's statutory estate liable for the contract of the husband. 3d. If the jury believe the evidence, Mrs. Lee's statutory estate is not liable to the plaintiff's demand." The court refused to give either of these charges, and exception was duly reserved to each refusal.

The charges given, the refusal to charge as requested, and the refusal to exclude the evidence of admissions of husband as against the wife, are now assigned as error.

THOS. COBBS, for appellant.—The smoke-house, carriage-house, and fencing, were not necessities for which the statutory estate was liable.—*Eskridge v. Ditmars*, 51 Ala. 253.

———, *contra*.

BRICKELL, C. J.—The liability of the wife's statutory separate estate for articles of comfort and support of the household, suitable to the degree and condition in life of the family, does not arise from contract. It is defined and declared by the statute, and it is immaterial whether she or her husband is the active agent in procuring them.—*Durden v. McWilliams*, 31 Ala. 438. The liability of the husband on whom the law devolves the duty of maintaining the family, is not lessened, because of the liability of the statutory separate estate, and until his liability is fixed by a personal judgment; there can be no judgment condemning the estate. The creditor has the right to enforce it by a joint suit against husband and wife, or having sued the husband to insolvency, on motion, a judgment may be rendered condemning the statutory separate estate to its satisfaction. *Cunningham v. Fontaine*, 25 Ala. 644. As the husband can not by mere contract create the liability on the statutory separate estate—as it arises from the declaration of the law

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and not from his act—no admission or promise made by him, can prevent or remove the bar of the statute of limitations from attaching to and defeating the remedy against the estate of the wife. One joint debtor can not be deprived of the benefit of the statute of limitations, by an admission or promise which his companion may make without his knowledge or consent.—*Lowther v. Chappell*, 8 Ala. 353. The policy of the statute of limitations is to foreclose litigation in a prescribed period, unless the bar is avoided by the equivalent of an express promise to pay, made by the party to be charged. The husband may charge himself by subsequent promises or admissions, but as he is incapable of creating in the first instance the liability of the statutory estate, he is equally incapable of reviving or continuing it. A promise or admission by him can have no other effect, than would the promise of a joint debtor. The claim preferred by the plaintiff was originally an open account subject to the bar of the statute of limitations of three years. The admission by the husband of its correctness—the giving of his promissory note for its amount, as to him converted it into an account stated, but did not and could not change its character as to the liability of the wife's statutory separate estate. The action is founded on the original account, and not on the account stated, or the note, which are the contracts of the husband, rendering his liability more effectual, but do not enlarge or relieve the liability of the statutory estate. *Sharp v. Burns*, 35 Ala. 653.

The claim of the plaintiff is for improvements made on the wife's real estate under an employment of the husband—fencing, building a smoke-house, and carriage-house. These improvements may have contributed to the *comfort* of the family or household, and may have been suitable to their degree and condition in life. But there are no facts shown by the bill of exceptions which justify the conclusion that they were necessary to *the support of the household*. Contracts may be made by the husband, or by the wife, for things which are not unsuited to the station in life of the family, or the degree of the wife's fortune, and which will promote the convenience and comfort of the husband and wife, and of those living under their roof, and legally dependent on them, which can not be enforced against the statutory separate estate. A carriage would add to the comfort, convenience and pleasure of the wife and her children, and her fortune and station in life may be such that she could justly expect that one should be furnished her by

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her husband, if he had her fortune in his own right. But her statutory estate, can not be made liable for its cost whether purchased by her or her husband.—*Eskridge v. Ditmars*, 51 Ala. 245. The dwelling-house in which the family resides, may be rendered more comfortable by blinds, doors, window-sash, &c., yet these when furnished, do not constitute a charge on the estate.—*Lobeman v. Kennedy*, 51 Ala. 163. Maintenance, necessities, for which the husband would be liable at common law *in invitum*, is the extent of the liability of the statutory estate. The *support*, the maintenance of the household, and not its comfort only, must be considered in ascertaining the existence of that liability. If a stranger had made for the wife, the improvements, there would be no ground for insisting that the husband could be made liable *in invitum* for their value. It would have been an interference with his domestic affairs, and of his right to control his domestic expenditures, the law could not have tolerated. Whenever an involuntary liability would not at common law be fixed on the husband for things furnished the wife, the liability of the wife's statutory estate can not arise, no matter who is the agent in making the contract. It is a narrow and limited liability which the statute declares. Under the statute as it existed when this contract was made, and its uniform construction, the liability of the estate extended only to food, raiment, habitation, medical assistance and medicines—necessaries for which the husband would be liable at common law, though supplied without his knowledge or consent.

The rulings of the Circuit Court were inconsistent with these views, and its judgment is reversed and the cause remanded.

Page v. The State.

Indictment for Murder.

1. *Opinion of physician; when admissible.*—A medical man, though not personally cognizant of the facts, may give his opinion as to the result of a wound or the cause of death, upon the facts proved on the trial; but where the facts are disputed, he can not give his opinion on the case on trial, but must be examined hypothetically, and his opinion on the state of facts which the jury regard as proved, then becomes evidence.

2. *Variance; what does not constitute.*—The mere mis-spelling in the
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indictment of the name of the injured person, is immaterial, if the pronunciation of the name proved is satisfied by the manner in which it is written—*e. g.*—as where the name is spelled *P-r-e-y-e-r*, and pronounced as if written *Preyer* or *Pryor*.

APPEAL from Washington Circuit Court.

Tried before Hon. H. T. TOULMIN.

Isaac Page, the appellant, was indicted for the murder of Tobin Preyer. He was found guilty of murder in the first degree, and sentenced to imprisonment in the penitentiary for life; and having reserved a bill of exceptions, brings the case here by appeal.

On the trial, as the bill of exceptions states, the State “introduced Dr. Jack Baker, a physician, whom the State offered as an expert, to testify to the effect of a certain wound inflicted on the deceased, of the particulars of which wound witness was ignorant, and the nature of which had been given in evidence by one John Stucky, a witness for the State, and during the time Dr. Baker was out of the court-room and under the rule. The defendant objected to the examination of Dr. Baker, but the court overruled the objection, and defendant excepted; whereupon the court permitted Dr. Baker to testify hypothetically as to the effect of a similar wound.”

The bill of exceptions further recites, that “there was evidence tending to show that deceased was called Tobe *Prior* or Tobe *Pryor*, as if it was thus spelled; but there was no evidence showing how his name was spelled. The defendant thereupon requested the court to charge the jury in writing, if they believed from the evidence that the name of the person killed was Tobin *Pryor*, or Tobin *Prior*, they must acquit the defendant.” The court refused this charge, and the defendants excepted.

HARRY PILLANS, for appellant.—In Ward’s case (28 Ala. 60), the court declares the rule to be, “if the names may be sounded alike, without doing violence to the power of the letter found in the variant orthography, then the variance is immaterial.” This is the strongest case which can be cited in behalf of the State; and yet, even according to that decision, there was a fatal variance here. The witnesses called the deceased *Pry-or*, as if his name were thus spelled, but deceased is described as *Prey-er* in the indictment. No way in which *Prey-er* can be sounded will give the name *Pri-or* or *Pry-or*. The name the indictment intended to designate may have been *Puryea*, or *Prear*, or *Preyer*, but never the

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common place name *Pryor*. Are not the two names more dissimilar than *Lyon & Lynes*, 5 Port. 236; *Humphreys* and *Humphrey*, 17 Ala. 35; *Barham* and *Barnham*, 6 Ala. 679? Yet in each of these cases the variance was held material.

HENRY C. TOMPKINS, Attorney-General, *contra*.—There was no error in permitting the witness Baker to testify as an expert, in the manner in which he was examined.—*Wilkinson v. Mosely*, 30 Ala. 567. The charge asked was properly refused. Nothing is more arbitrary than the pronunciation of proper names. This court can not judicially know that *Preyer* is not pronounced *Pryor*. In ordinary words, where the pronunciation is governed by rules, the diphthong *ey* has three sounds; that of long *a*, long *e*, and also a slight sound of *e*, as in valley. Give it either sound in the indictment, and the difference in the sound of the name proved and that alleged, is certainly no more perceptible than that between *Edmindson* and *Edmundson*, which were held to be *idem sonans*, in *Edmundson v. The State*, 17 Ala. 179.

BRICKELL, C. J.—1. The opinions of medical men as to the cause of death, or of disease, or as to the consequence of wounds, though not founded on observation of the person afflicted, or who may have died, but on the facts as proved by other witnesses, it is the constant practice to receive in evidence. If the facts are disputed, they are not allowed to express an opinion upon the case on trial, for the case as they determine it, might not be the case the jury would find from the evidence. Then, they may be examined hypothetically—the counsel on each side may put to them such states of fact, as the evidence warrants, and ask an opinion thereon. The opinion on the state of facts the jury regard as proved, then becomes evidence.—1 Green. § 440; 1 Whart. Ev. § 452; *U. S. v. McGlue*, 1 Curt. C. C. 9; *Dexter v. Hall*, 15 Wall. 9; *Wilkinson v. Mosely*, 30 Ala. 572. From the meagre statement of the bill of exceptions it is fair to infer this was the course pursued in the examination of Dr. Baker.

2. An indictment for murder must be so certain as to the party against whom the offense was committed that the prisoner will know and understand who it is he is charged with having killed. A variance in the name of the party slain, at common law, entitled the prisoner to an acquittal, though it was not a bar to a second indictment identifying the slain by his true name.—Whart. Hom. §§ 796, 804. The statute authorizes an amendment correcting the misdescription, with

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the consent of the prisoner, or if he refuses to consent, the prosecution may before the jury retire, be dismissed, and the court may order a new indictment preferred.—Code of 1876, §§ 4816–17. The indictment avers the name of the deceased was *Tobin Preyer*. The evidence on the trial not showing the true spelling of his name, did show that it was pronounced as if written *Pryor*, or *Prior*. The mere misspelling of the name of the party injured, will not vitiate, or produce a fatal variance. The test is whether the pronunciation of the name proved, is satisfied by the manner in which it is written.—Whart. Hom. § 796; *Ward v. State*, 28 Ala. 53. Greater latitude is allowed in the pronunciation of proper names than in any other description of words. Numerous cases in which the name proved has been pronounced *idem sonans*, with that averred, though differing in spelling, are collected in 1 Whart. Cr. Law, § 597. Precedents afford however but little aid in determining the question. Whether the name as written, would be pronounced as it is shown the name of the deceased was pronounced, depends upon whether the letter *e* would be sounded, and the sound which would be given it. It is most probable that it would not be separately *sounded*, and the pronunciation of the two names would be generally identical. There was not a substantial variance between the name written and the name proved, and the charge requested was properly refused.

Judgment affirmed.

Kelly v. The State.

Indictment for Larceny.

1. *Witness; how may be impeached.*—The character of a witness may be impeached, by the testimony of a person who three years before and previously lived in the same neighborhood with him, and knew his past and present general reputation and character there, though such person knows nothing of them in another neighborhood, to which the witness removed, and where he then resided.

APPEAL from Madison Circuit Court.

Tried before Hon. LOUIS WYETH.

On the trial of the appellant, Kelly, who was indicted for grand larceny, the State introduced one Elias Hartfield, who testified to the commission of the offense by Kelly, on the

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night of July 5th, 1878. This witness, two years before that date, had resided in the Meridianville precinct. The defendant then introduced one Blankenship, who testified that he "lived in the Meridianville precinct, where Hartfield lived three years ago, and knew his general character and reputation in said neighborhood, but did not know his general reputation in the neighborhood in which he lived, at the time of the trial, (June 7th, 1879,) or at the time the offense was committed. The court, on objection of the solicitor, refused to allow the witness to answer whether Hartfield's character was good or bad, and the defendant excepted. The defendant then offered to prove by said Blankenship that he knew the general character of the witness, Hartfield, in the neighborhood of his former residence in Meridianville precinct, and that such character was and is now bad; that Blankenship from such character would not believe said witness on oath."

The court, "holding that the present character of witness, sought to be impeached, was all that could be inquired into," refused to allow the proof, and defendant excepted.

It would seem from the bill of exceptions, that Meridianville precinct was in the same county in which the witness, Hartfield, lived at the time of trial, but the distance between Meridianville precinct and the neighborhood to which Hartfield removed, is not stated.

The rulings to which exception was reserved are now assigned as error.

NICHOLAS DAVIS, and WALKER & SHELBY, for appellant. The principles declared in *Martin v. Martin*, 21 Ala. 201, are decisive in favor of appellant. *Sleeper v. Van Middlesworth*, 4 Denio, 431, is also a strong authority for the admission of the evidence which the court rejected.

DANIEL COLEMAN, and HERMAN HUMPHREY, *contra*.—A witness must be able to state what is generally said of a person *by those among whom he dwells* or with whom he is chiefly conversant, for it is this *only* that constitutes general reputation or character.—*Conkey & Herrington v. The People*, 5 Park. C. R. 31. The general character of a witness, at his place of business, can not be shown by evidence of what rumor said of him before he came to that place.—*Campbell v. State*, 23 Ala. 44. In the case of *State v. Howard*, 9 N. H. 485, the court says, after stating what are the proper inquiries in matters relating to general character, "these inquir-

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ries, as stated, relate to the character of the witness *at the time of examination.*" In the case of *Hadley v. State*, 55 Ala. 31, the court held "that a knowledge of the general character of the prisoner in the neighborhood in which he lived, is a *necessary predicate* to the introduction of evidence of character."

On trial of an issue respecting the veracity of a witness, much must be left to the sound discretion of the primary court, and the appellate court will not reverse on account of its rulings unless it clearly appears that the appellant was deprived of some important legal right in the case.—*Sonneborn v. Bernstein*, 49 Ala. 168.

Martin v. Martin, 25 Ala. 201, relied on by the appellant, does not sustain his assignments in this case. The witness, Butler, in that case *did* testify to knowing "Smedley's general character among his neighbors and those who knew him, before stating what that general character was."

MANNING, J.—The question in this case is, whether the character of a witness may be impeached by the testimony of a person who three years before and previously, lived in the same neighborhood with him, and knew what his reputation and general character there were and are,—but does not know what they are in the neighborhood in which he now resides.

This precise question was raised and decided in the affirmative in *Sleeper v. Van Middlesworth*, 4 Denio, 431, with the difference that in that case, the witness impeached had removed four years before from the neighborhood from which the testimony that was offered against him came. The court said: "It is not, looking to common experience in human conduct, generally found to be true that a thorough change from a bad to a good character, is wrought within four years. It may, and it is to be hoped, often does occur; but such is not the common course in life. On the contrary there is a strong probability that one whose general character was bad four years since, is still of doubtful or disparaged fame. So much at least may be asserted without evincing the feeling of a misanthropist or any unseemly lack of charity. It appears to me, therefore, that the court erred in rejecting the evidence." None of the court dissented.

The same views, in effect, were taken of the subject by this court in *Martin's Ex'r v. Martin*, 25 Ala. 201. Light is thrown upon "the present character of the witness," by reflections from it as it was disclosed in the recent past.

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The judgment of the Circuit Court must be reversed and the cause remanded.

Let the prisoner remain in custody until discharged by due course of law.

Peacher v. State.

Larceny of Outstanding Crop.

1. *Election by prosecution; what does not amount to.*—The introduction of a witness who testified to seeing the defendant commit a larceny on three successive days, she being alone on the first two occasions, but present with her son on the last, is not of itself, in the absence of any attempt on the part of the State to particularize or identify either of the offenses, an election to proceed for a conviction on either of the larcenies committed in the son's absence.

APPEAL from the Circuit Court of Lowndes.

Tried before the Hon. JAMES Q. SMITH.

The appellant, Tom Peacher, was indicted for stealing "a quantity of corn, to-wit, one bushel of corn, said corn being a part of the outstanding crop of corn belonging to William D. McCurdy, against the peace," &c.

The State introduced a witness who testified that she saw defendant, on three successive days, steal corn from the outstanding crop of corn belonging to W. D. McCurdy, in Lowndes county, and before the finding of the indictment; that the first day, no one was with her, but on the third day her son was with her, and also saw the defendant steal the corn. The State then introduced the son, and asked if he "saw defendant taking corn from W. D. McCurdy's field?" The defendant objected to the question, and asked the court to confine the witness to the first day spoken of by the first witness for the State. The court overruled the objection, and defendant excepted, and the witness testified that he was with his mother, the first witness, and saw defendant taking corn from the outstanding crop of corn of W. D. McCurdy. The court told the jury that any statement by the first witness as to the two other takings before the time when defendant was seen by both the witnesses, was not in evidence, and must not be considered. Throughout the trial, all the testimony was confined to the act seen by both of the witnesses.

[Pecher v. State.]

This was all the evidence, and the defendant asked the court to give the following written charge: "That in determining the guilt or innocence of the defendant the jury are confined to the evidence of the first criminal act of which the State introduced evidence, and unless the evidence taken with all the facts and circumstances proved as to said first act, satisfied the jury beyond a reasonable doubt of the guilt of the defendant, they must acquit him." The court refused this charge, and the defendant excepted.

JOHN ENOCHS, for appellant.—The court should have confined the State to proof of the first act shown by its first witness, and therefore should have given the charge asked.—*McPherson v. State*, 54 Ala. 221; *Crocheron v. State*, 30 Ala. 542; *Elam v. State*, 24 Ala. 48.

H. C. TOMPKINS, Attorney-General, *contra*.—The evidence nowhere shows that the State had done anything which amounted to an election to prosecute for the act first seen by the first witness. It does not appear that the State had first introduced evidence of the taking on the first day, which would make the authorities cited by the appellant's counsel applicable; if they can be made to apply to the questions involved in this case at all. On the other hand, this bill of exceptions expressly states that all the evidence as to the two first days was excluded from the jury, and throughout the trial the evidence was confined to the taking on the third day. The defendant had no right to force the State to elect to prosecute the act first committed in point of time.—35 Ala. 351; 52 Ala. 386; 42 Ala. 532; 41 Ala. 405; 39 Ala. 252.

BRICKELL, C. J.—The indictment contains a single count, charging the appellant with stealing corn, part of an outstanding crop; is in the general form prescribed by the Code, omitting any express averment of time or place, and in terms, is broad enough to allow the introduction of evidence of any larceny of corn, part of an outstanding crop, the property of the individual named as owner, committed within the bar of the statute of limitations, before the finding of the indictment. It must however be construed as charging but one larceny, and the evidence must be confined to one distinct, substantive offense. If the State should offer evidence of several distinct offenses, the court would compel the prosecuting officer to elect the one for which he would ask a conviction.—*Elam v. State*, 56 Ala. 48; *Crocheron v.*

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State, 30 Ala. 512; *Hughes v. State*, 35 Ala. 251; *Smith v. State*, 52 Ala. 384. As a general rule, it may be stated that when the State offers evidence of an offense, or of facts and circumstances which will constitute an offense within the terms of the indictment, identifying and individualizing it before the minds of the jury, an election is made to prosecute for that offense, which can not be subsequently abandoned, and another distinct act, or other facts and circumstances proved as ground of conviction. In *Hughes v. State*, *supra*, it was said by this court, "it is difficult to lay down a clear rule, which will enable the circuit courts to determine in all cases, when the prosecutor has made his election of the particular act or offense for which he will proceed in a given case. Some latitude must be allowed to that officer while conducting the preliminary examination, that he may ascertain the particular act or transaction to which the witness refers. To require him to elect, before he has learned enough to enable him to individualize the transaction, would, in many cases, work a denial of justice. When however he has pursued the inquiry until a particular act or transaction has been brought before the minds of the jury,—has become identified or individualized—if he then prosecute the inquiry with the view of learning the details and particulars of the act or transaction, he must then be held to have made his election." The great purpose of the rule is to prevent prejudice to the defendant in the minds of the jury by the introduction of evidence of offenses for which he is not really indicted, to which he is not finally to answer, and building up a conviction on inferences of guilt from the fact that he had committed another offense.—*Gassenheimer v. State*. 52 Ala. 313; 1 Bish. Cr. Pr. § 462.

The State introduced a witness, who, without objection from the defendant, proved that on three successive days, she saw the defendant stealing the corn of the prosecutor. On the first two days no one was with her, but on the third day her son was, and also saw the defendant taking the corn. The son was then introduced, and against the objection of the defendant, was permitted to testify to the larceny on the third day, the court excluding all evidence of the other larcenies. A case for election was doubtless presented, and it was the duty of the court to order it, confining the evidence to one of the larcenies. A state of facts may have existed, which would have authorized the introduction of evidence of the others, to have aided in the proof of the one for which a conviction was claimed.—*Mason v. State*, 42 Ala. 532; *In-*

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gram v. State, 39 Ala. 252. The admissibility of the evidence for that purpose, is not the question presented. The single inquiry is, whether the State had made an election to proceed for a conviction for the offenses, or either of them, committed in the absence of the son, before the court intervened, and confined the evidence to the larceny which he saw. That question must be answered negatively. It is not shown that the State had in any way particularized or identified either of the offenses. The witness stated that she had on three successive days seen the defendant stealing the corn of the prosecutor, and that on one of these days, her son was with her. No one offense was distinguished from the other, except as to the time of its occurrence, and the State was not bound to confine the evidence to the order of time in which they were committed. There was no attempt to inquire into the particulars of either offense, until the court intervened. The intervention was acted on by the prosecuting officer, and a conviction had only on evidence of the larceny witnessed by the son. We find no error in the record, and the judgment is affirmed.

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Real Action in the nature of Ejectment.

1. *Tax-collector's deed of land; when color of title.*—A tax-collector's deed of land sold for payment of taxes, without proof of his authority to sell, may constitute a claim and color of title, the element of an adverse possession.

2. *Charges; when properly refused.*—The court is not bound to modify or reform instructions requested; and if asked in terms which may mislead, or require explanation or modification, they may be refused.

3. *Adverse possession; what not necessary to constitute.*—Color of title is not necessary to constitute an adverse possession, on which the statute of limitations will operate, or which will avoid a conveyance by one out of possession; a *bona fide* claim of title openly asserted as hostile to the true owner, renders the possession adverse.

4. *Same; when commences under tax title.*—If a purchaser at tax sale of lands, enters into possession under the purchase, before the delivery of the deed, *bona fide* claiming title, his possession is adverse from its inception, and not merely from the date of the delivery of the deed; though its delivery may be necessary to constitute color of title.

5. *Same; what does not break continuity of.*—The forcible interruption of possession by a naked trespasser, redressed by legal remedies, can not be set up by him to break the continuity of an adverse possession.

[Ladd v. Dubroca.]

APPEAL from the Circuit Court of Mobile.

Tried before Hon. HENRY T. TOULMIN.

This was a real action under the Code, brought by the appellant, John M. Ladd, against the appellee, Sylvester Dubroca, to recover possession of a certain tract of land situated in Mobile county. The case was tried on the plea of the general issue.

On the trial, the plaintiff introduced Vol. 3 of the American State Papers; Public Lands, vol. 3, page 10, No. 67, being No. 234 Land Claims east and west of Pearl river, communicated to the House of Representatives January 5, 1816—Report No. 3, No. of Registry 67—and an act of Congress relating thereto confirming a grant by the Spanish Government of the lands in controversy to John, Daniel, and Benjamin Ward; and produced evidence tending to show that John Ward died on or about the year 1839, and that he had a son named Daniel, who had also died a few years ago. There was also evidence tending to show the execution of a deed conveying all their interest in the premises in controversy to the plaintiff, by Daniel and Tarleton Ward, who were the sons of John Ward, and a similar deed by Henry Ward, Emeline his wife, and Patrick Ward. The depositions of Henry and Emeline Ward were taken by the plaintiff. Henry Ward testified that he was a son of John Ward, and that he had four brothers, Patrick, Tarleton, Daniel, and Moses, and one sister, Nancy. He further testified, he knew nothing of the land except from hearsay; that he had heard his father and brothers, who were all older than he was, speak of living in the neighborhood of the lands in controversy, and that he had never been on them. The defendant claimed under a tax title obtained in August, 1860. None of the legal requirements of a tax title were shown, except it appeared that the lands in question were assessed to one Sylvester Dubroca, then deceased, and that one M. Dubroca had requested the tax-collector to sell the land, and at the sale had become the purchaser, and that defendant, who was a son of said Sylvester Dubroca, and a nephew of M. Dubroca, claimed title through said M. Dubroca. To the introduction of the tax title, and all deeds and acts thereon or thereunder, the plaintiff objected; but his objections were overruled and the evidence admitted, and he excepted. The defendant also introduced a deed to the premises made to him by Nesin Dubroca, brother of M. Dubroca, who purchased at the tax sale.

There was evidence tending to show that the said M. Du-

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broca died in possession of the land, in 1869 or 1870, claiming the same as his own; that he died intestate, without children, and that the said Nesin Dubroca was his only surviving brother.

There was evidence that in the spring of 1867 the plaintiff was in possession, and was ousted by process of forcible entry and detainer, on the 15th of February, 1869, at the suit of M. Dubroca.

There was also evidence tending to show that Sylvester Dubroca, the father of defendant, had possession of the land, cutting wood and timber on it and claiming it as his own, for many years prior to 1860. This was substantially all the evidence.

The plaintiff requested the court to give the following written charges:

"3. That if the jury believe that the plaintiff represented the persons referred to in the report of the commissioner as Wards '67,' then the defendants can not successfully defend, unless the defendant has shown a continuous, adverse possession under claim of title for ten consecutive years."

"4. That the adverse possession in this case does not commence under the alleged tax title, until its delivery to the defendant, or ancestor, or grantor."

"9. That the sale of Wards to Ladd, if Ladd was in possession of the land at the time the deeds were made, and that the possession is not such by the defendant as to avoid the deed to Ladd, unless Dubroca was in the actual possession of the land conveyed at the time the deeds were made."

"14. That defendant can not estimate the period of time during which Ladd was in possession, if he was, from 1867 to 1869, *i. e.* from the spring of 1867 to February, 1869, as a part of his adverse possession."

A separate exception was reserved to the refusal of the court to give each of these charges.

The court, at the request of the defendant, gave the following charges, which were in writing:

"1. The jury must be satisfied from the evidence that the John Ward from whom the plaintiff claims to derive title, was the same identical person named in the claim said to be confirmed by Congress to Benjamin Ward, Daniel Ward, and John Ward; and if they are not satisfied of this, the plaintiff can not recover.

"2. The claim being in favor of Daniel Ward, Benjamin Ward, and John Ward, the John Ward from or through whom the plaintiff claims could only recover one undivided.

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third part thereof, and his grantee can not recover any more than John Ward could under the evidence.

"3. If the jury believe from the evidence that John Ward left five children surviving him, and the plaintiff having obtained a deed of three only, the plaintiff can in no case recover more than three undivided fifths of one-third part of the land sued for, without proof that John Ward was the heir of Daniel and Benjamin Ward named in the State Papers."

To the giving of each of these charges, the plaintiff separately excepted.

The various rulings to which exceptions were reserved are now assigned as error.

ALEX. MCKINSTRY, for appellant.

L. H. FAITH, *contra*.

BRICKELL, C. J.—1. The deed of a tax-collector purporting to convey lands, sold by him for payment of taxes, without proof of his authority to sell, may constitute a claim, and color of title, the element of an adverse possession. *Dillingham v. Brown*, 38 Ala. 311. There was no error consequently in the admission of the deed from the tax-collector to Dubroca.

2. If the defense had been limited to the statute of limitations, the bar of the statute could not have been invoked, without evidence of a continuous adverse possession for ten years before the action was commenced. The third charge requested would then perhaps have been proper. But the defense was not limited to the operation of the statute of limitations. The conveyances under which the appellant claimed title were assailed on the ground that at the time of their execution, the grantors were out of possession, and the lands were held adversely. It is the fact of an adverse possession, existing at the time of the conveyance; the fact that the alienation is of that which lies in entry or re-entry, of a mere cause of action, without regard to the length of time such possession may have continued, which avoids the conveyance. If this charge had been given in the broad terms in which it was requested, it would have led the jury to believe that the defense founded on the fact of adverse possession, when the conveyances to the plaintiff were executed, could not be sustained, unless the possession was continuous for ten years. A court is not bound to modify or

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reform instructions requested. If the party requests them in terms which may mislead, or if they require explanation or modification, they may be refused.

3. Color of title is not necessary to constitute an adverse possession, on which the statute of limitations will operate, or which will avoid a conveyance. A *bona fide* claim of title openly asserted as hostile to the true owner, renders the possession adverse.—*Hinton v. Nelms*, 13 Ala. 222; *Abercrombie v. Baldwin*, 15 Ala. 363; *Herbert v. Hanrick*, 16 Ala. 581. The deed of the tax-collector may have been *color* of title only from the time of its delivery. Yet, if the purchaser entered into possession, under his purchase, before its delivery, claiming title, the possession was adverse not from the delivery of the deed, but from its inception. The bill of exceptions does not purport to set out all the evidence, and it is not shown when possession was taken under the purchase at the tax sale, nor when the deed of the collector was delivered. If the proof was undisputed, (which if necessary to sustain the ruling of the Circuit Court, we would be bound to presume), that possession was taken under a claim of title, before the delivery of the deed of the collector, the fourth charge requested is erroneous. The adverse possession would commence from the entry of the purchaser or those claiming under him, and not from the delivery of the deed.

4. The ninth charge requested is so ambiguous and confused, that it is difficult to understand. We suppose, however, it was intended to assert that if Ladd was in actual possession when the conveyances were executed to him, the prior adverse possession of Dubroca would not avoid them. But Ladd's entry into possession was forcible, and he was ejected by the speedy pursuit of legal remedies. The forcible interruption of a naked trespasser redressed by legal remedies will not, as to him, avail to break the continuity of an adverse possession.—*Farmer v. Eslava*, 11 Ala. 1028. The fourteenth charge requested was properly refused, asserting as it does, that the period of Ladd's forcible entry and detainer, ought to be deducted in computing the length of the adverse possession; the twelfth and thirteenth, because they assert that color of title is necessary to render a possession adverse.

5. It is not necessary to notice specially the several charges given at the instance of the defendant. They seem to assert plain propositions of law applicable to the evidence.

Affirmed.

[Walker v. State.]

Walker et al. v. State.*Indictment for Arson.*

1. *Verdict of guilty as to one count; effect of.*—A verdict finding the defendants guilty on a particular count of the indictment, operates as an acquittal as to the other counts.

2. *Nolle prosequi; effect of entry of, as to one count.*—An entry of *nolle pros.* as to one of several counts of an indictment, before the defendant is put in jeopardy by the empanneling and swearing of the jury for his trial, does not affect his acquittal of the count, but merely destroys that count, leaving the indictment as though the count had never been in it.

3. *Same.*—Several persons were jointly indicted, in an indictment containing two counts, the first charging arson in the first degree, and the other in the second. When the case was called for trial four of the defendants appeared, and by leave of the court, the "State entered a *nolle pros.* as to the first count of the indictment; and the defendants pleaded guilty as to the remaining counts, and were sentenced accordingly." At another term, the remaining defendants went to trial on the indictment, on a plea of not guilty, and the jury returned a verdict of guilty as charged in the first count, *held:* The entry of the *nolle pros.* put an end to the first count as to all the defendants, leaving the indictment as though it had originally contained only the second count; and having been in jeopardy as to the second count, the defendants could not be again tried for that offense; but the first count having been put out of the indictment, there was nothing in it to authorize a verdict of guilty on that count; and though the jury found a verdict of guilty of that offense, the defendants were never in jeopardy under that charge, and could be again indicted and tried for arson in the first degree.

APPEAL from the Circuit Court of Wilcox.

Tried before Hon. JOHN K. HENRY.

The appellants, Lewis Walker and Cato Sellers, together with others were indicted for arson, at the fall term, 1875, of the Circuit Court of Wilcox county. The indictment contained two counts, the first charging that the defendants "did, in the night-time, wilfully set fire to, or burn a prison, to-wit, the jail of Wilcox county, which said prison was then and there occupied by persons lodged therein at night." The second count charged the defendants with "wilfully setting fire to, or burning the jail of Wilcox county, the said jail then and there being a building erected for public use." At the term at which the indictment was found, a trial was had as to all the defendants except the appellants. On the trial, the State entered a *nolle prosequi* as to the first counts, and the prisoners then on trial pleaded guilty to the second count, and were each sentenced to the penitentiary for five years.

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At the spring term, 1878, the appellants were put on trial and the jury returned a verdict of "guilty as charged in the first count of the indictment," and assessed their punishment at ten years imprisonment in the penitentiary.

The appellants moved in arrest of judgment on the following grounds: 1. "Because the first count of the indictment upon which the jury rendered their verdict was '*nol. prosequi*' at the fall term of the Circuit Court of Wilcox county, 1875." 2. "Because there was no count in the indictment charging the defendants with arson in the first degree." 3. "Because the verdict of the jury was without authority of law, there being no count in the indictment to authorize such a verdict, it appearing from the record that said count on said indictment was *nol. prosequi* at the fall term of the Circuit Court of Wilcox county, 1875." This motion was overruled, and the defendants each sentenced to the penitentiary for ten years. It was shown on the trial that the appellants were not present when the "*nolle prosequi*" to the first count was entered, being then confined in the penitentiary on another charge.

JAMES T. BECK, and JOHN MCCASKILL, for appellants. The count upon which the jury found their verdict was *nol. prosequi* at the fall term, 1875, and there was no count in the indictment which charges arson in the first degree. The defendants could make no objection to the indictment before trial, because the only count in the indictment was the second count, and that was a good one.

H. C. TOMKINS, Attorney-General, *contra*.—The appellants were not present when the *nolle prosequi* was entered, and they were not parties to the proceeding; they would have been bound by no action or step taken at the time, and consequently can claim no advantage of anything which occurred then. The proceeding was "*res inter alias acta*" as to them.

STONE, J.—The defendants were found guilty on the first count in the indictment, without any mention in the verdict of the second count. This is equivalent to a verdict of not guilty on the second count, and the prisoner can not again be indicted or tried on that count.—*Murray & Bell v. The State*, 48 Ala. 675.

Seven persons, including the two appellants, were charged in one indictment with the crime of arson. The indictment

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contained two counts, each charging the setting fire to, or burning the jail of Wilcox county. In the first count it was charged that persons occupied or lodged in said jail at night. This is arson in the first degree.—Code of 1876, § 4346. The second count describes the jail as a building erected for public use. This is arson in the second degree.—Code of 1876, § 4347. There is a wide difference in the measure of punishment attached to the two degrees. The indictment was found and filed in court at the fall term, 1875. At the same term, three of the defendants, not including the appellants in this case, were tried and convicted. The minute-entry states that the defendants, William Simpson, Monday Knox, H. C. Stephens, *alias* Calvin Stephens, and Robert Green came into open court, in their own proper persons and by counsel, “and the State with leave of the court entered a *nolle prosequi* as to the first count of the indictment, and thereupon the defendants, William Simpson, H. C. Stephens, *alias* Calvin Stephens, and Robert Green, each pleaded guilty as charged in the second count of the indictment,” &c. Sentence was then pronounced on them. The defendants in the present case, Lewis Walker and Cato Sellers, were put on trial at the spring term, 1878, on the plea of not guilty. The verdict of the jury was, “we, the jury, find the defendants, Cato Sellers and Lewis Walker, guilty as charged in the first count of the indictment.” It was then moved in arrest of judgment that the said first count of the indictment having been *nol. prosequi*, there remained in the indictment only the second count; and the verdict of the jury being an acquittal of the charge contained in the second count, the prisoners were entitled to their discharge. The court overruled the motion, and sentenced the prisoners each to confinement in the penitentiary for ten years.

The entry of a *nolle prosequi*—(unwillingness to further prosecute)—in a criminal cause, before the defendant is put in jeopardy by the empanneling and swearing the jury for his trial, is of frequent occurrence. The effect is, not to absolve the prisoner from liability for further prosecution for the same offense. Its only effect is, to put an end to the then prosecution, before the prisoner had been jeopardized thereunder.—See *State v. Kreps*, 8 Ala. 951; *State v. Blackwell*, 9 Ala. 79; *Barnett v. The State*, 54 Ala. 579; 1 Bish. Cr. Law, (6th ed.) §§ 1014, 1015, *et seq.* This, however, is not the question presented by this record.

We think when the State entered a *nolle prosequi* of the

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first count in the indictment, the effect was to destroy entirely that count, and to leave the indictment as containing only one, the second count. It stood then as if the grand jury had never preferred the first count. To hold otherwise, would be to enter on complications and embarrassments, upon which, in the absence of precedent, or some more substantial argument than we have yet perceived, we fear to enter. We think this question entirely unlike that which was considered in Aaron's case, 39 Ala. 75. The result is that the defendants were put to trial solely on the second count; and as we have shown above, the jury acquitted them of that charge. The verdict furnishes no warrant whatever for the judgment which the court pronounced, and the same must be reversed. But, inasmuch as the defendants have not been put in legal jeopardy on the charge contained in the first count, they may be again indicted for that offense.

Reversed and remanded, but the prisoners will remain in custody until discharged by due course of law.

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Indictment for Forgery.

1. *Grand jury, power of legislature to prescribe mode of drawing.*—While the constitution prohibits indictments otherwise than on the presentment of a grand jury, it imposes no restraint or limitation on legislative power in declaring the mode in which the jurors shall be drawn or summoned, or which inhibits the consultation of public convenience in determining whether the jurors shall be selected from the body of the county at large, or from a particular vicinage.

2. *Act establishing Perry Court of Quarter Sessions; constitutionality of ninth section of.*—The ninth section of the act establishing the Court of Quarter Sessions for Perry county, requiring that the grand jurors for the November term of the court, shall be drawn from the immediate vicinity in which the court was held, is not violative of the letter, spirit, or purposes, of the constitution.

3. *Forgery, what subject of.*—A writing in words and figures as follows: "Uniontown, August 23, 878. Mr. Cohen.—Please send me ten dollars, and I will sell some cotton next week and pay you the money back. Henry Goldmon," may be the subject of forgery.

4. *Fraudulent intent; what sufficient averment of.*—When the intent to defraud or injure is an ingredient of an offense, the indictment may aver it generally.

5. *Proof of handwriting, what evidence not admissible to prove.*—It is error to allow a witness, who confesses having written the forged instrument under the direction and at the request of the prisoner, to write in the presence of the court and jury a similar instrument, for the purpose of comparison between the two, or to sustain such witness, when impeached.

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APPEAL from Perry Court of Quarter Sessions.

Tried before Hon. POWHATTAN LOCKETT.

The appellant, and one Green Lewis, Jr., were jointly indicted for forgery at the November term, 1878, of the Perry Court of Quarter Sessions. In accordance with the ninth section of the act establishing the Court of Quarter Sessions, the grand jury was composed exclusively of persons who resided in Uniontown beat. The indictment charged, in the Code form, that the defendant did forge "an order for money, in words and substance as follows :

"UNIONTOWN, August 23, 878.

"Mr. Cohen.—Please send me ten dollars, and I will sell some cotton next *week* and pay you the money back.

"HENRY GOLDMON."

On the trial, the State entered a *nol. pros.* as to Green Lewis, Jr., and upon the demand of a trial by jury, by the appellant, ordered the sheriff to summon twenty-four persons from whom to select the jury to try this case.

Elias Cohen, a witness for the State, testified that he was a clerk in the store of C. M. Cohen, who carried on business in the town of Uniontown ; that on the 23rd of August, 1878, about dusk, one Jack Williams, brought to him at the said store an instrument in writing, which corresponds in words and figures with the writing set out in the indictment ; that doubting the genuineness of it, he carried it to Mr. R. Cohen, who was the cashier in said store, and also to a nephew of Mr. Henry Goldman, and they concluded at once that the writing was not genuine ; that Mr. Goldman spelled his name "Goldman" and signed it "H. F. Goldman," while in the instrument his name was signed "Henry Goldmon," and that Mr. Goldman drew his orders on "C. M. Cohen," while the instrument was addressed to "Mr. Cohen." This witness further testified that from his knowledge of the handwriting of Mr. Goldman, and of his manner of doing business, he did not think he could have been defrauded by it, although at first he had serious doubts of its genuineness, and would have sent the money if the instrument had been genuine.

R. Cohen testified to the same facts, except that he detected at once that the writing was a forgery and could not have been deceived by it. He also testified that he would have paid the money had the order been genuine.

Jackson Williams, another witness for the State, testified that the defendant, and Green Lewis, Jr., came to him in the afternoon of the 23rd of August, 1878, and borrowed a

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lead pencil, the defendant saying that he wanted to write a note or a letter, and that then they went across the street, and later in the evening, the defendant gave him the paper above described, and requested him to carry it to Mr. Cohen, and that he did so, and gave it to Mr. Elias Cohen, who asked him where he got it from; that he told him the defendant gave it to him; that he received nothing from Mr. Cohen, who told him to tell the defendant to come back in the morning; that he delivered this message, but the defendant did not go, and that he (witness) was ignorant of the character of the paper, or what it was for.

Green Lewis, Jr., was then introduced, and testified that on the 23rd of August, 1878, the defendant came to him and requested him to write a note for him to Mr. Cohen for ten dollars, stating that Mr. Goldman had given him a note for that amount, but that he had lost it, and he wanted one just like the one he had lost, so he could get the money to carry back to Mr. Goldman; that defendant lived with Mr. Goldman at the time; that he (Williams) could not write; that they borrowed a pencil from Jackson Williams, and went over to Mr. D. Hertz's store, and witness wrote the said instrument above described, at the request of the defendant, and did not expect to share with the defendant in the money obtained thereon. The instrument described in the testimony of Elias Cohen was shown to witness and identified by him. The defense having impeached the witness Green Lewis, the State re-called him, and requested him, in the presence of the jury, to write a note similar to the one described, and the said witness wrote in the presence of the jury (without having the instrument alleged to be forged near him) in words and figures as follows:

“UNIONTOWN, August 23.

“Mr. Cohen.—Please send me \$10 dollars and i will sell some cotton next week and pay you.

“HENRY

“GOLDMON.”

The State then offered said writing to the jury as evidence, for the purpose of a comparison with the instrument alleged to have been forged. The defendant objected to the introduction of said writing in evidence, because it had not been proven that witness wrote it, and because it was irrelevant and immaterial. The court overruled the objection and allowed said writing to go to the jury as evidence, for the purpose of comparison as aforesaid, to which ruling the defendant excepted.

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This was in substance all the evidence, and the court, among other things, charged the jury as follows:

"Forgery is the false making or material alteration of an instrument which has the capacity to impose a legal liability with the intent to defraud or cheat." "I charge you that this is such an instrument in writing as is the subject of the crime of forgery." "That the general averment of the intent to defraud is sufficient without alleging and proving that any particular person was defrauded, or intended to be defrauded." To each of said charges the defendant excepted. The defendant then asked the following charges in writing: "1. If the jury believe from the evidence that the instrument alleged to have been forged was such as not to impose on C. M. Cohen, or either of the Cohens, then they must acquit the defendant." "2. If the jury believe from the evidence that the instrument alleged to have been forged was in words and substance as follows, to-wit:

"UNIONTOWN, August 23, 878.

"Mr. Cohen.—Please send me ten dollars and i will sell some cotton next week and pay you the money back.

"HENRY GOLDMON, then the said instrument is not an order for money, and the defendant can not be convicted under this indictment." The court refused to give either of these charges, and the defendant separately excepted. The jury having returned a verdict of guilty of forgery in the second degree, the defendant moved in arrest of judgment on the ground, among others, "that the instrument set forth and described in the indictment, is not an order for money." This motion was overruled, and the defendant excepted. The charges given, and the refusal to charge as requested, the admission of the paper written by the witness in the presence of the jury, and the overruling of the motion in arrest of judgment, are now assigned as error.

E. M. VARY, JOHN F. VARY, C. D. HOGUE, and GEO. H. BRADFIELD, for appellant.—1. The indictment in this case was not found by a legal grand jury. Section nine of the constitution provides "that no person shall, for any indictable offence, be proceeded against criminally by information, &c., provided that in misdemeanors the General Assembly may dispense with a grand jury," &c. Section twelve: "That the right of trial by jury shall remain inviolate." An indictment is an accusation in writing presented by the grand jury of the county, charging a person with an indictable

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offense.—Code of 1876, § 4781. See 4 Blackstone, 302 and note; Bouv. Law Dict. title Indictment, 18 ed. The grand jury was selected from among the best citizens of the county, *some out of every hundred*.—4 Blackstone, 302, 303; Bish. Crim. Prac. 1868, vol. 1, § 721; Proffatt on Jury Trial, § 41. And the statutes of this State have always required the grand jury to be selected from among the citizens of the county. Code of 1876, § 4732. The act to establish the Court of Quarter Sessions of Perry county is unconstitutional, so far as it confines the selection of persons to serve as grand jurors to the residents of Uniontown beat. It deprives the citizen of the privilege of being free from criminal proceeding, except upon the indictment of a grand jury of his county. Statutes which would deprive a citizen of rights of person and property, without a regular trial according to the course and usage of the common law, would not be the law of the land. 1 Kent Com. 3 ed. vol. 2, pp. 12, 13 and note b.; 4 Dev. (N. C.) 15.

The instrument is not an order. It is not properly designated by the term employed in the indictment. It is not an order for money. It is a mere authority for one to furnish, and another to receive money on the credit of the drawer, which, when executed, created a debt only from the drawer. 53 Ala. 494; 14 Ala. 590; 24 Ala. 489; 29 Ala. 684; Bish. on Statutory Crimes, §§ 325, 327, 335. The court erred in permitting the witness to write before the jury, and his writing to go to the jury as evidence. The instrument alleged to have been forged had no legal capacity to defraud anybody but Cohen, as it was a mere request addressed to Cohen to lend money, and if it was so dissimilar in handwriting, &c., as not to deceive or defraud the Cohens, it could deceive no one, and the charge ought to have been given.

H. C. TOMPKINS, Attorney-General, *contra*.—The constitution prohibits a person from being proceeded against criminally for this character of crime, except upon indictment, but does not undertake to limit the power of the legislature to prescribe qualifications as to who shall be grand jurors. As the legislature has the right to require that no person except a freeholder shall sit as a grand juror, so it would have a right to require the grand jury to be selected from a certain community, as they have done in this case, the law requiring the grand jury at one term to be selected from those subject to jury duty residing in Uniontown beat, and at the other

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terms from the rest of the county. As to the particular locality in a county the jury is to come from, the power of the legislature is not limited; the question for them is only one of expediency. An order is defined by Worcester to be a written direction or demand addressed to a person. An order for money, therefore, would be a written direction or demand for money. The instrument set out in the indictment is addressed to a Mr. Cohen, directs him to send the person by whom it purports to be signed, ten dollars, and is an order for money.—*McGuire v. State*, 37 Ala. 162; *Jones v. State*, 50 Ala. 161; *Horton v. State*, 53 Ala. 489.

It is not necessary that the person committing the act of forgery should have had present in his mind an intention to defraud a particular person, if the consequences of his act would possibly defraud some person.—3 Greenl. Ev. 89; *Jones v. State*, 50 Ala. 161; *Rogers v. Marseis*, 2 C. & K. 356; *Reg. v. Hill*, 8 C. & P. 274; *Reg. v. Cooke*, 8 C. & P. 582.

The writing of the witness Lewis was admissible to corroborate him, the defence having attacked his character; and though this evidence may not be of much weight, it is still a fact which, with others, may amount to conclusive proof. 54 Ala. 528. It may not be admissible for the purpose of comparing handwriting, but it was admissible in confirmation of the witness' testimony.—See 1 Greenl. Ev. § 581.

BRICKELL, C. J.—1. The common law required that every indictment should be found by a grand jury, twelve of whom at least must have been of the county in which the offense was committed, *freemen, and lawful leige subjects*. It was not required that they should be selected from that part of the county, in which the defendant dwelt, or from that part in which the guilty act was done—nor were these excluded. The law was satisfied, when they were returned from the *vicinage*, which comprehended the county. The constitution declares “that no person shall for any indictable offense, be proceeded against criminally by information,” &c., excepting particular cases, within which the present does not fall. This is unquestionably a constitutional guaranty against prosecution otherwise than on the presentment of a grand jury. For an indictment is at the common law, and under statutes existing prior to and at the adoption of the constitution, defined as an accusation in writing, returned into court on the oath of the grand jury of the county, charging a person with an indictable offense. But there is no restraint or limitation on legislative power in declaring

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the mode in which the jurors shall be drawn or summoned; or which inhibits the consultation of public convenience, in determining whether the jurors shall be selected from the body of the county at large, or from a particular vicinage. The ninth section of the act establishing the Court of Quarter Sessions for Perry County requiring that the grand jurors for the November term of the court shall be drawn from the immediate vicinity in which the court was held, is not violative of the letter, spirit, or purposes of the constitution. *Sanders v. State*, 55 Ala. 183.

2. That the instrument charged to have been forged is the subject of forgery, and is an order for money, and was properly so described in the indictment, is too clear for controversy. It is a written demand or direction addressed to a particular person for the payment to another of a certain sum of money, purporting to be signed or drawn by one who thereby professes to have the right to draw it. Such a writing the authorities have settled is an order for the payment of money within the meaning of kindred statutes. Bishop Stat. Crimes, §§ 327, 331. It may be the order was drawn so unskillfully that it would not have imposed upon or defrauded Cohen to whom it is addressed. It is the evil intent to defraud—that the instrument forged shall be used as genuine, and not the capacity *in fact* of the instrument to accomplish the intent, which the law regards. Fraud may not be perpetrated; no benefit may be derived from the instrument; yet, if there is the evil intent, consummated by the false making, and it is not a legal impossibility, from the want of legal capacity apparent on the face of the instrument, to deceive and defraud, the crime is committed.—2 Bish. Cr. Law, §§ 596, 603.

3. The statute declares that when an intent to injure or defraud is an ingredient of an offense, the indictment may aver it generally.—Code of 1876, § 4799.

4. Upon the question, whether the witness Lewis, who confessed having written the forged instrument at the request and under the direction of the appellant, should have been permitted to write in the presence of the court and jury a similar instrument, that the jury might institute a comparison between the instruments, we think the court below erred. The rule which has prevailed in this State, borrowed from the English courts, is, that proven specimens of handwriting, can not be received for the purposes of comparison with a disputed instrument. The only recognized exception, if it can be termed an exception, is when other papers pertinent

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to the issue on trial are properly in evidence, the jury may under the instructions of the court institute a comparison. *Little v. Beasley*, 2 Ala. 703; *State v. Givens*, 5 Ala. 747; *Bishop v. State*, 30 Ala. 34; *Kirksey v. Kirksey*, 41 Ala. 626. The rule proceeds not only on the ground, that if it were otherwise, the issues before the jury could be indefinitely multiplied, and their attention distracted from the real matter in controversy, involving unreasonable embarrassment and delay in the administration of justice, but upon the broader ground of preventing fraud, which could be easily perpetrated in the selection of spurious, or prepared instruments for the purposes of comparison. When a comparison of writings is permitted, specimens prepared for the occasion are excluded.—1 Whart. Ev. § 715. In *King v. Donahue*, 110 Mass. 155, it was held, a party to an action, could not in the presence of the jury write his signature for the purpose of having it compared with the disputed signature. The rule in reference to proving handwriting, is, that the witness must not have derived his knowledge, from papers prepared for his instruction with a view to his testifying in the particular case.—1 Whart. Ev. § 707. Lord KENYON, in *Stranger v. Searle*, 1 Esp. 14, gave as a reason for the exclusion of the evidence, that “the party might write differently from his common mode of writing his name, through design.” And in *Doe v. Suckermore*, 5 Ad. & El. 705, it was said by COLERIDGE, J., speaking of evidence of handwriting: “The test of genuineness ought to be the resemblance, not to the formation of letters in some other specimen or specimens, but to the general character of writing, which is impressed on it, as the involuntary and unconscious result of constitution, habit or other permanent cause, and is therefore of itself permanent. And we best acquire a knowledge of this character, by seeing the individual write at times when his manner of writing is not in question, or by engaging with him in correspondence; either supposition giving reason to believe that he writes at the time, not constrainedly, but in his natural manner.” There are cases in which a witness denies his signature, and may on cross-examination be compelled in the presence of the court to write his name for the purposes of comparison. This may fall within the latitude of a cross-examination, and whenever permitted, of that examination, the signature so written becomes a part. But it would open too wide a door for fraud, if a witness was allowed to corroborate his own testimony, by a preparation of specimens of his writing for the purposes of comparison. By design a corres-

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pondence with, or a departure from the disputed writing could be fabricated; and whether there was such design, is an inquiry with which the jury should not be embarrassed.

This error compels a reversal of the judgment of conviction, and it is not necessary to prolong this opinion by a decision of the other questions presented. The judgment is reversed and the cause remanded. The prisoner will remain in custody until discharged by due course of law.

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Bill in Equity to declare and enforce Trust, and compel Settlement of Partnership Accounts.

1. *Bill to establish partnership; when not maintainable.*—A bill will not be entertained to establish a partnership between two persons, settle its dealings, and declare one of them trustee for the benefit of the other as to purchases of real estate, when more than twenty years have elapsed since the accrual of the right, before suit brought, during all of which period the defendant denied and disregarded the rights of the other alleged partner; and the fact that the partners were brothers, complainant being averse to litigation, and on that account failing to sue in time, will not alter the case.

2. *Stale demands; rule as to.*—Where a claim is sought to be enforced, *prima facie* within the operation of the rule against stale demands, the complainant should show by positive and specific allegations, some act or recognition of the party sought to be charged, within the period which will take the case out of the rule; mere general and vague averments of facts and circumstances, out of which the right sought to be enforced arises, or on which recognition of it is sought to be based, will not suffice.

APPEAL from Chancery Court of Mobile.

Heard before Hon. H. AUSTILL.

The appellants, who are the widow and children of Angelo M. Philippi, (the widow also being his administratrix,) filed this bill on the 17th of April, 1877, against the appellee, Antonio Philippi, seeking thereby to establish a partnership between the appellee and said Angelo, and to compel a settlement of its affairs; and, secondly, to have the said appellee declared a trustee for the said Angelo as to an interest in certain property which is described in the bill, and to have dower therein assigned to the widow.

The case made by the bill is as follows: About the year 1835, Angelo M. Philippi, a native of Corsica, came to Mobile and engaged in business as a saloon and boarding-house keeper. He was thrifty and prospered, so that in 1840 he

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was deemed a man of means, and in that year became a naturalized citizen of this State.

About the year 1840 or 1841, the appellee, Antonio Philippi, the younger brother of Angelo, also came to Mobile. Antonio on his arrival was apparently in humble circumstances, and without employment. Angelo lodged him, gave him employment, and finally associated him in business with himself. Their affairs continued to prosper, and in 1845, the elder brother being then a man of wealth, resolved to revisit his native land. Upon his departure, he placed all his property in the custody of Antonio, in trust, to manage and invest for him, which trust Antonio accepted, and acknowledged by writings signed by him; and Antonio continued to carry on, for the joint benefit of himself and his brother, the partnership business in which they had previously been engaged.

Angelo remained in Corsica eleven years, and while there married his wife Angela, by whom he had a number of children.

In the meantime, Antonio remaining in Mobile, managed his brother's affairs and property with skill, as well as the joint business in which they were partners. The magnitude of this property and business was such that in May, 1847, Antonio held the sum of \$10,000 the property of his brother, on which he was to pay him interest; and for the year ending November, 1847, the profits of the joint business was \$8,000, and the income derived for the same period from slaves, which Antonio held as the joint property of himself and his brother, was \$4,500. The bill charges that for a time Antonio kept true accounts between himself and Angelo; that he invested the gains of himself and his brother largely in real estate, taking the title thereto in his own name; that in the year 1848, the real estate, consisting of six houses, thus held by him was of the value of \$26,000, and that subsequently he bought a large amount of real estate with the revenue derived from these houses and the other joint property.

In 1856, Angelo returned to Mobile and called on Antonio for a settlement of the partnership affairs, and for the payment of his share of the profits, which the bill alleges Antonio from "time to time" promised should be done.

The bill further charged that the partnership had never been dissolved; that it never was insolvent, and had no debts outstanding against it; and "that no account had ever been had of the same, or division made of its assets finally." . .

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Angelo died in Mobile intestate in May, 1874, leaving the appellants as his widow and heirs-at-law.

The bill alleges, as a reason for the delay in asserting the rights claimed therein, "that said Angelo repeatedly declared that the thought of a suit at law with a brother was repugnant to him, and that he always expected his brother would render him a full account, and pay him his share of the property which he had placed with him in trust before leaving for Europe in and about the year 1845; that should defendant fail to do so, he repeatedly told his children that they would not be restrained after his death by the considerations which controlled him during his life-time, from proceeding against the defendant, his brother.

The appellee demurred to the bill, setting up the statute of limitations, and the staleness of the demand made therein, and on a hearing the chancellor sustained the demurrer and dismissed the bill.

This decree is here assigned as error.

F. G. BROMBERG, and STEPHENS CROOM, for appellants. The trust set up in the bill is a *direct trust*, and is evidenced by writing. No formality is necessary to create a trust.—1 Perry on Trusts, §§ 82, 83, 86; 2 Wash. on Real Prop. 442, 446-7. Any writing signed by the party to be charged is sufficient to create a direct trust.—Code of 1876, § 2199; 1 Perry on Trusts, §§ 79, 80, 81. And a direct trust is never barred by lapse of time.—2 Perry on Trusts, §§ 863, 866; 1 Dan. Ch. Pr. (4 Am. ed.) 560, 618, n. 3; 18 Wall. 509; 3 Johns. Ch. 139; 5 Pick. 322. Mere lapse of time constitutes no bar to a bill to enforce a subsisting trust, and time begins to run against a trust only from the date of its open disavowal. Even unjustifiable delay and gross inattention on the part of the *cestui que trusts* furnish no bar to relief against persons conversant with the trust.—22 Ind. 149; 5 Ves. 492-94; 4 Myl. & Craig, 52. No length of mere possession or occupation can bar the *cestui que trust*.—2 Wash. on Real Prop. 457, § 37; 8 Watts (Penn.) 509; 2 Hawk's (N. C.) 290-1. Delay in instituting proceedings where the parties are members of the same family, is not so strictly regarded as where they are strangers to each other.—2 Story's Eq. Jur. (10th ed.) § 1520d; 23 Ala. 690; 2 Seld. 268; 2 Halst. Ch. 159. The *cestui que trust* can follow trust property, if not held by a *bona fide* purchaser without notice, or pursue the proceeds, or the substituted property.—1 Perry on Trusts, § 447; 18 Wall. 332; 3 How. (U. S.) 333; 3 Sneed, (Tenn.) 462.

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Even if the heirs of Angelo are barred by lapse of time, yet his laches could not strip his widow of her dower rights in the property. These rights are not barred by lapse of time. Angelo died on the 4th of May, 1874, and his widow's rights then first became complete.—Code of 1876, §§ 2232, 2233; 36 Ala. 532; 11 Ala. 386; 2 Scrib. on Dower, 4, § 3; ib. 135, § 4; 1 Perry on Trusts, § 324. Dower right is not affected by any act of the husband or by any adverse possession against him.—1 Wash. on Real Prop. (3d ed.) 284; 17 Am. Law Reg. 319. Courts of equity have jurisdiction in the assignment of dower.—40 Ala. 538; 26 Ala. 547.

STEWART & PILLANS, *contra*.—The partnership matter is very indefinitely stated. The allegations in respect to it are not sufficiently certain and explicit to found upon it a remedy which for eighteen years was not claimed by the decedent. The transaction set forth was simply an agency, and not such a trust as calls for the jurisdiction of equity. The proper definition of a trust, in the sense required by a court of equity, is where there is a conveyance of title to a trustee for the use and benefit of a third person.—1 Perry on Trusts, ch. 1, p. 1, and particularly sections 1 and 2; and see sections 7, 8, 13, 16, 17, 18, and 24. The complainants call this an express trust. But an express trust is a *contract*, and must be a valid contract, not in violation of the statute of frauds; and if not to be executed within a year is void as a contract unless there be a memorandum in writing.—See (Statute of Frauds), 1 Perry on Trusts, 66, §§ 82, 83. The statutes of Alabama recognize and enforce this principle absolutely as to lands.—Rev. Code, § 1590. The bill does not say whether the property left in the hands of Antonio was real or personal. The trust is not defined, but if it is to be construed for accumulation, then another statute is in the way of recovery.—Rev. Code, § 1580. If the trusts set up in the bill are constructive trusts, they are within the application of the statute of limitations.—See *Coyle v. Wilkins*, and *James v. James*, in manuscript. The demurrer was properly sustained. 41 Ala. 344; 8 Porter, 211; 21 Ala. 692; 5 Ala. 90; 2 Ala. 555.

As to the dower claimed, unless the husband had an estate in the lands there can be no dower, and the bill shows no dowable estate in the husband.

STONE, J.—The object of the present bill is, first, to establish a partnership between defendant and Angelo M.

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Philippi, through whom complainants claim, and to have a settlement of its dealings; and, second, to have said defendant declared a trustee for said Angelo, of an interest in certain property, a part of which is described in the bill. A summary statement of the case made by the bill is, that about the year 1840, Angelo and Antonio Philippi formed a partnership in the keeping of a restaurant and boarding-house, and that the business was prosperous and remunerative; that in the year 1845, Angelo, who was of foreign birth, returned to France, leaving the business of the partnership undivided and unsettled, in the hands of his brother Antonio, and that the partnership has never been dissolved or settled up; that in 1856 Angelo returned to Mobile, his former home, where he afterwards continued to reside until 1874, when he died intestate. The present bill is filed by the administratrix, widow and heirs-at-law of Angelo Philippi; the suit being commenced April 17th, 1877. The material allegations of the bill, which are relied on as showing its equity, are as follows: "That extremely amicable relations existed between defendant and his brother, said Angelo M. Philippi, from the time said defendant arrived in Mobile, in or about the year 1840 or 1841, uninterruptedly until in or about the year 1856, and that the partnership relations between defendant and his said brother Angelo, were also continuously amicable and harmonious, until the return of said Angelo from Europe, as hereinafter stated; that said partnership between defendant and his brother, said Angelo M. Philippi, was upon equal terms, share and share alike. . . . That in or about the year 1845 aforesaid, said Angelo returned to France on a visit, and placed all of his affairs and property of every kind and description in the city of Mobile aforesaid, in the keeping of his brother, the defendant, to manage and invest for him, and to invest the rentals, incomes and profits of said property and business; and your complainants charge that said defendant expressly accepted said trust, and also evidenced and acknowledged the same by writings signed by himself. Your orators and oratrixes further show that at this day they can not set forth in detail all the said affairs and property so placed in trust with said defendant by said Angelo M. Philippi, but they charge that on or about the 5th day of May, 1847, defendant had in trust for said Angelo M. Philippi, the sum of ten thousand dollars belonging to said Angelo M. Philippi, upon which the said defendant had agreed with the said Angelo to pay him interest. And complainants further charge that besides holding in trust the

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separate property of said Angelo M. Philippi, the defendant continued to carry on for account of himself and of his brother, said Angelo M. Philippi, the partnership affairs between them, and for a time continued to keep true accounts, and therein set out the respective share of each in the joint gains of said partnership, as was his duty; and they further charge that the magnitude of the partnership operations hereinbefore referred to was such, that defendant's accounts for the year ending November 1st, 1847, showed the net joint profits to be eight thousand dollars, one-half of which, or four thousand dollars, defendant set out to the account of said Angelo M. Philippi, and held subject to said Angelo's order in March, 1848. And complainants further charge that the number of slaves held, at or about the same time by said defendant, in trust for himself and said Angelo M. Philippi, was such that the annual income derived from the hire of said slaves for the year 1848 was four thousand five hundred dollars. And complainants further charge that the real property held by defendant in trust for himself and his brother, said Angelo M. Philippi, at or about that time, consisted in March, 1848, of at least six houses in the city and county of Mobile, whose aggregate value exceeded twenty-six thousand dollars. Your orators and oratrixes further show and charge that no settlement was ever made of said trust and partnership affairs, after said Angelo M. Philippi departed for Europe to revisit the same, in or about the year 1845. And complainants further show that said Angelo M. Philippi returned to Mobile in or about the year 1856, and thereafter requested defendant to account for the partnership property, and for the real and personal property held by said defendant in trust for him, the said Angelo M. Philippi; and that defendant promised from time to time so to do; but has hitherto neglected and failed so to do. Your orators and oratrixes further show and charge that said partnership has never been dissolved by voluntary act of the parties thereto, and was never insolvent; that there are no debts outstanding against it, and that no account has ever been had of the same, or division made of its assets finally. . . . Complainants further show that said Angelo repeatedly declared that the thought of a suit at law with a brother was repugnant to him; and that he always expected that, at some time, defendant would render him a full account, and pay him his share of the various property and affairs, placed by him in trust with his said brother the defendant, before leaving for Europe in and about the year 1845. That should defendant

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fail so to do, he repeatedly told his children that they would not be restrained after his death by the considerations which controlled him during his life-time, from proceeding against defendant, his brother." The bill charges that the titles to the real property, in which it seeks to establish a trust, were all taken in the name of the defendant alone; many of the titles bearing date from 1845 to 1850. Neither writings or letters are made exhibits to the bill, nor is there any attempt to set out the contents of writings, further than is shown above.

It will be observed that the bill does not disclose, or attempt to disclose, in what the partnership property consisted, when it is alleged it was placed in the hands of Antonio, defendant, in trust. It does not appear whether it was real or personal property, or what was its value. No attempt is made to set forth the date or contents of the paper writing, by which, it is averred, the trust was acknowledged. Nor is it shown in what manner, or in what description of property, Antonio was to invest the funds of Angelo, charged to have been left with him in trust for investment. Neither is any date or time fixed, after Angelo's return from Europe in 1856, when Antonio, "from time to time," promised "to account for the partnership property, and for the real and personal property held by said defendant in trust for him, the said Angelo M. Philippi," nor is it averred to what extent, if any, Antonio admitted himself liable to account. Everything is stated in the most general and indefinite terms. It is a cardinal rule to construe equity pleadings most strongly against the pleader. Under this rule, no act in recognition of the partnership or trust, is averred to have been done after the year 1848. The present bill was filed twenty-nine years afterwards. Even if we attach any importance to the alleged promise to account after Angelo returned from Europe, this was twenty-one years before this suit was commenced. We fully concur with the chancellor that the present complainants have slumbered too long on their claim to have it entertained in a court of equity.—*Rhodes v. Turner*, 21 Ala. 210; *Austin v. Jordan*, 35 Ala. 642; *Goodwyn v. Baldwin*, 59 Ala. 127; *Dawson v. Hoyle*, 58 Ala. 44; *Bradford v. Spyker*, 32 Ala. 134; *Harrison v. Heflin*, 54 Ala. 552.

The claim of dower is equally lost to the demandant, Mrs. Angela F. Philippi. It falls within neither of the subdivisions of section 2232 of the Code of 1876. Her husband was not "seized in fee during the marriage." According to the lapse of time, during which her husband slumbered on

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his alleged rights, the intendments and presumptions above expressed, it is not shown that, as to any of these lands, "another was seized in fee to his, [her husband's] use." Dower is a derivative estate, carved out of the inheritance; and when there is no inheritance, there can be no dower. *Edwards v. Bibb*, 54 Ala. 475. Nor had her husband, at the time of his death, "a perfect equity, having paid all the purchase-money thereof."

Affirmed.

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Indictment for Grand Larceny.

1. *Corpus delicti; what sufficient proof of.*—Appellant was on trial for the larceny of a hog. The hog alleged to have been stolen was, with a number of others, kept in a lot, and disappeared during the absence of the owner, without breaking the enclosure. Evidence was introduced tending to show that the defendant and his wife had in their possession, about the time the hog disappeared, a large piece of meat and portions of the body of a hog which in size and color of the hair corresponded with that which might have been obtained from the hog that was gone; that this meat was, after being discovered, put away and concealed by the defendant's wife, and that there was prevarication on the part of the defendant and his wife in regard to the meat. After the defendant had examined several witnesses in his behalf, he moved the court to discharge him, on the ground that the *corpus delicti* had not been proved,—*held*: That the court rightly overruled the motion, and allowed the jury to pass on the evidence.

2. *Oath to jury; what record must show as to.*—It is sufficient if the record recite that the jury were sworn. It is not necessary that it should appear in what terms the oath was administered. It will be presumed to have been done properly when it is shown that they were sworn.

APPEAL from Circuit Court of Coffee.

Tried before Hon. HENRY D. CLAYTON.

The appellant was indicted, tried, and convicted for the larceny of a hog. On the trial, the State introduced a witness, who testified, that about the middle of November, 1877, he went with one Harper to a field in which Harper had put his hogs to fatten; that they missed from said field a small white hog; that they made diligent search for said hog, and could neither find it, or any place where it could have gotten out. They went to defendant's house, and found him absent. They stated to his wife that they had "lost something," and wished to hunt for it—not stating to

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her what was lost or desired to be searched for. She said they might search her house, but should not search the smoke-house, which she then locked. They looked into the smoke-house, through cracks, and found therein a barrel in which was a piece of fresh hog's liver, and a small piece of a side of fresh pork, which piece "seemed to suit the size of the missing hog." Witness and Harper also discovered the nose of a small hog, lately killed, on the plate of the smoke-house. They carried the liver from the barrel and the nose from the plate off with them, and they found on the liver and in the barrel white hog hair. The nose which had been rudely dressed, also had white hair on it.

The witness further testified that they then procured a search-warrant and warrant of arrest and returned to the defendant's house; that when they returned, defendant had not come home; that they arrested him before his arrival at home, and after his arrest they demanded the key to the smoke-house of the defendant's wife, but she refused to give it up. They then took the key and searched the smoke-house. The barrel had been moved from where it had stood on one side to the centre of the smoke-house, and had been washed out; that a piece of bacon was in the barrel, but the first piece of pork had been removed, and could not be found.

The defendant, while under arrest, was then accused of taking the lost hog, which he denied; and when asked to account for the fresh liver and meat in his smoke-house, replied that he had several days before killed one of his own hogs which was black and white or sandy colored, and that he had killed the hog because it was "skittish or wild." This witness further testified that the defendant had hogs, some of which were about the size of the hog lost, but that all of defendant's hogs were black or black and white, and "that there were no skittish or wild hogs about them."

Harper, another witness for the State, testified to the same facts as to the missing of the hog and the search of the defendant's premises, and what was done and said, as detailed by the preceding witness. He testified further that defendant had but one white hog in his stock, and that he (witness) had killed that one on account of mischief done by it about his premises; that the defendant's hogs were black or black and white spotted; that they were all gentle, and "none wild or skittish." He further testified that there were "no skittish" hogs in the neighborhood.

The defendant then introduced a witness who testified that

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he lived about a mile and a half below the defendant, on the creek, and that four years ago he sold the defendant a sow and six shoats, some of which were white; that defendant owned ten or more black hogs when he sold these hogs to him; that in the latter part of the year 1876, or early in 1877, the sow had six pigs, some of which were black and white spotted, some black, and one white and white sandy; that they became "wild or skittish" in the summer of 1877, and used in the swamp near his house, and from there to defendant's house; that he knew them well, having sold the sow to the defendant, and that he often saw them about defendant's house before they got skittish; that defendant got him to look after them, after they commenced running in the swamp near him, and he saw and fed them after that. This witness further testified, that about this time, and the same week that Mr. Harper missed his hog, defendant told witness he had killed the white and "white sandish" one of that bunch, and that witness continued to look after said hogs, and never saw that one since the defendant reported that he had killed it, and that said hog would have weighed about fifty or sixty pounds. The venue was also proved. At this stage of the evidence, the defendant moved the court to exclude, or limit in its effect as far as he was concerned, the evidence of the State's witnesses in relation to going to the defendant's house, what they saw there, what meat they found, the color of the hair on the same, the conversation they had with his wife, her conduct and declarations in his absence. The court excluded the evidence of the conduct and declarations of the wife during defendant's absence, but allowed the evidence of finding the meat in the defendant's smoke-house, the color of the hair on the meat and in the barrel, and the size of the meat found, to go to the jury as evidence against the defendant, and he excepted. This was all the evidence. The defendant thereupon moved the court to discharge him, and not put him on further defense, for the reason that "the offense charged is a felony, and the law requires in felonies that the *corpus delicti* be clearly and satisfactorily proved, before the defendant can be required to make defense; and from all that appeared by the evidence given, the hog may be still alive." The court refused the motion and the defendant excepted. The admission of the evidence excepted to, and the refusal to grant the motion and discharge the prisoner, are now assigned as error.

The judgment-entry after showing the arraignment and plea, recites that "thereupon came a jury of good and lawful

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men, to-wit, A. J. Wise and eleven others, who being sworn, say," &c.

J. E. P. FLOURNOY, for appellant.—The court should have discharged the appellant, there not being sufficient proof of the *corpus delicti* to put the defendant on his defense. The law requires the *corpus delicti* to be clearly shown, and from all that the evidence showed the hog may yet be living. The hog was small and might have gotten out of the field, and no reason is shown why the defendant should have stolen it. The court should have excluded from the jury, the evidence of the finding of meat in the defendant's smoke-house in his absence, and everything about the meat, as the proof was that the key to the smoke-house was not in the defendant's possession. It was not shown that he was in any way cognizant of the meat being there, or of the circumstances of its being placed there. The evidence utterly fails to connect the defendant with the alleged larceny in any way, and his motion to be discharged should have been granted.

The judgment-entry does not show that the jury were properly sworn, and is insufficient to support the sentence.

H. C. TOMPKINS, Attorney-General, *contra*.—Whether or not there was sufficient proof against defendant, was a question for the jury. There was some evidence tending to show his guilt, and the jury were the sole judges of its sufficiency. The *corpus delicti* is a fact like any other, and may be established by proof of circumstances tending to show its existence. It is no more necessary to establish that by direct or positive proof, than it is to establish any other fact.

The evidence of the color of the hair on the meat found, and its size, was admissible to prove the identity of the meat found with that lost; and evidence of its being found in the smoke-house of defendant, shortly after the hog was missing, was admissible as tending to show the commission of the offense by defendants, who were proven to be husband and wife.—Roscoe's Crim. Ev. 633.

The judgment-entry does not undertake to set out the oath administered to the jury. It recites that they were sworn; and this court will presume they were sworn according to law.

MANNING, J.—We can not say that there was any error in the refusal of the judge to discharge the prisoner, after the evidence had been all given in, on the ground that it did

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not prove the *corpus delicti*, as it is called, and was not sufficient to put him on his defense. Nor was the motion consistent with the course pursued on defendant's behalf. Witnesses were previously introduced by and examined for him, of course, upon the assumption, that this was made requisite by the testimony against him, on the part of the State. How much credit was due to defendant's witnesses, it was for the jury before whom they testified to decide.

As to the *corpus delicti*, it was shown that the hog alleged to have been stolen was with a number of others kept in a lot, in which they were put up to be fattened; that during the absence of the owner this animal disappeared. When he returned, it was gone,—and diligent search was made in vain, both for the hog, and for a place in the fence, through which it might have escaped. This was a year before the trial. Evidence was introduced tending to show that defendant and his wife had in their possession about the time the hog disappeared, a large piece of meat and portions of the body of a hog, which in size, and color of the hair, corresponded with what might have been obtained from the hog that was gone,—that this meat was after being discovered put away and concealed by defendant's wife, and that there was prevarication, or what the jury might consider to be prevarication and falsehood, on the part of defendant and his wife in regard to that meat.

Whether the evidence was sufficient or not to convict was a question for the determination of the jury. The judge of the Circuit Court did not err in permitting it to go to them.

The assignment of error, that the record does not show that the jury was sworn is founded on a mistake. It is not necessary that it should appear in what terms the oath was administered. It will be presumed to have been done properly when it is shown that they were sworn.

Judgment affirmed.

[May v. Duke.]

May v. Duke.

Bill in Equity by Ward against Sureties of Deceased Guardian, &c.

1. *Guardianship; what not bar to bill for settlement of.*—An annual settlement passing and allowing the guardian's accounts, and ascertaining the balance due the ward, is not a bar to a bill filed by the ward after attaining majority, to compel a settlement of the guardianship.

2. *Guardian and sureties; of what can not take advantage.*—Neither the guardian, nor his sureties, can avoid a partial or final settlement of the guardianship, because the ward was not represented by guardian *ad litem*; but the ward may.

3. *Conversion; what amounts to.*—A loan of the ward's money upon no other security than the note of the borrower, no matter how undoubted his solvency and credit, is unauthorized; and the ward may elect to treat it as a conversion, or ratify it as proper administration; and in the latter event only does it become assets of the ward's estate.

4. *Same.*—If the ward does not ratify an unauthorized loan, neither purity of intention in making it, nor diligence and good faith in endeavoring to prevent loss thereby, will absolve the guardian from liability.

5. *Guardian; for what entitled to credits.*—A guardian is entitled to credit only for moneys actually expended, or necessities furnished the ward; the *onus* being on the guardian to support his claim for credits, by evidence of a character which would support his action, if he were suing the ward in an action *ex contractu*.

6. *Petition; what relief can not be granted on.*—Where decree is rendered against co-sureties upon a bond, it is error to modify it, upon petition of one of the defendants, so as to render the other primarily liable for common burden; if such an equity exists, it must be presented by cross-bill.

APPEAL from Chancery Court of Sumter.

Heard before Hon. A. W. DILLARD.

The appellee, Anna K. Duke, upon attaining majority, filed her bill against May and Sprott, the former being a surety, and the latter the personal representative of one King, a co-surety upon the bond of appellee's guardian, seeking an account or decree for the amount due the ward.

The case made by the bill and exhibits was this: In 1854, Anna Duke, mother of appellee, was appointed her guardian, and May and King were sureties upon her bond, and received some \$1,400, the amount of appellee's distributive share of her father's estate. On an annual settlement made by the guardian in 1857, a balance was ascertained in favor of the ward for \$1,409.86. The guardian made no other settlement, and died in 1865, "leaving no personal represen-

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tative, and no estate whatever, real or personal, to be represented."

The record of the annual settlement, which was made an exhibit to the bill, recites that on "this day came up for action and decree, by consent of A. C. Herndon, who is present and is appointed guardian *ad litem* of said minor, the account current of said guardian, for an annual settlement of her said guardianship, which on examination shows a receipt of assets to the sum of \$1,754 28-100, and disbursements, properly avouched, to the sum of \$314, leaving for the ward a balance on this day of 1,409 86-100 dollars; and it appearing that said account is legally stated, and properly avouched, it is therefore ordered and adjudged that the same be received, allowed, passed, recorded, and filed as an annual settlement of said guardianship up to 24th of October, 1857."

A demurrer to the bill, which set up in substance that complainant had an adequate remedy at law, and "already had all the rights of a judgment creditor, and could not have more if the court were to render a decree in her favor," was overruled.

The answers denied the regularity of the annual settlement and the correctness of the decree, and alleged that the guardian was entitled to credits for disbursements for the support and maintenance of the ward, exceeding the amount of the decree, and claimed a right to the benefit of such credits. The answers also contained other denials, not necessary to be further noticed. The cause was submitted for final decree, upon bill and exhibits, answers and testimony, and the chancellor decreed that complainant was entitled to relief, and directed an account and reference to the register for that purpose, who was directed to debit the respondents with the amount found due on the annual settlement, with interest to the 20th of November, 1874, and to allow them fair and reasonable allowance for the board, tuition, &c., of the ward from 1857 to March, 1865.

It is unnecessary to notice the evidence in detail. It was substantially without conflict, and proved the allegations of the bill. It was shown by the testimony of May that he was administrator of the estate of complainant's father, and that he kept the amount of her distributive share of his estate, giving the guardian a note therefor, without security, which he paid to the guardian in Confederate money in the year 1864.

The register made a report and stated an account upon the

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basis of the decree, and allowed the respondents certain credits for amounts paid for the board and tuition of the ward, which did not amount yearly to enough to keep down interest on the amount due the ward. Exceptions were filed to this report, on the ground that the testimony showed respondents were entitled to larger credits for board, &c. The evidence seems to support the report, and it would serve no useful purpose to give it in detail. These exceptions were overruled, the report confirmed, and a decree rendered and execution ordered against respondents, for the amount stated in the report of the register.

At the same term Sprott filed a petition, asking that the decree be modified, so that execution should be first issued against May, on the ground that he had received the money and was primarily liable, and such a course would prevent litigation between them. This modification was granted. May alone appeals, and he here assigns the decree overruling the demurrer, the decree granting relief, the overruling of the exceptions to the register's report, the final decree, and the order modifying that decree.

THOMAS B. WETMORE, for appellant.—The decree of 1857, in the settlement then made was had without a guardian *ad litem*. True one was appointed, but the record fails to show that he accepted the trust. If valid and binding on the sureties, it should have been sued on at law, and the demurrer to the bill should have been sustained. If it is invalid, it should not be made evidence against appellant. The evidence shows that the guardian received the Confederate money in good faith, and neither she nor her sureties are liable because the results of the war rendered it worthless.—See *Waring v. Lewis*, 53 Ala. 617, and authorities there cited.

The reformation of the decree of the chancellor, on the petition of Sprott was certainly erroneous. The relief thus granted could not be obtained on petition; but must be sought by cross-bill.—Daniel's Ch. Pr. 1743, and cases in note thereto.

SNEDECOR & COCKRELL, *contra*.—The bill was filed by a ward, on attaining majority, against the sureties of her deceased guardian, to obtain a settlement of her guardianship. The bill plainly alleges, and the proof fully shows, the appointment of the guardian; her receipt of the money; her failure to make final settlement; her death in 1865, leav-

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ing no assets and no personal representative. As to the equity of such a bill, see 26 Ala. 53; 20 Ala. 477; 16 Ala. 494; Rev. Code, §§ 2324, 2325. The testimony also clearly shows, that the loan of the ward's money to May was made without any security—was unauthorized and in the very teeth of the statute. The unsecured note never became the property of the ward, and the principle, that payment of Confederate money, received in good faith by the guardian, do not constitute a *devastavit*, or *conversion*, has no application. See, as to ownership of note, 29 Ala. 410.

BRICKELL, C. J.—The settlement made by the guardian in 1857, was a partial or annual, and not a final settlement. The decree rendered would not have authorized the issue of an execution, nor supported an appeal. The only effect of it was as evidence of the state of the guardian's accounts at the time. It was *prima facie* evidence, (if regularly made), that the guardian was not then chargeable with any greater sum of money, than was charged against her, and was entitled to all the credits embraced in the account. On final settlement its correctness was disputable, and it would have been competent for either guardian or ward to have shown its incorrectness in any respect. It was not a bar to the present bill, filed by the ward after her majority, to compel a settlement of the guardianship.

A settlement of a guardianship, partial or final, is irregular, unless the infant ward is represented by a guardian *ad litem*. But of the irregularity, neither the guardian nor his sureties can take advantage. As to them the settlement is as binding and conclusive, as it would have been, if the guardian, who is bound to conduct the settlement regularly, had not proceeded until there was an appointment and appearance by a guardian *ad litem*.—*Hutton v. Williams*, 60 Ala. 107; *Lewis v. Alfred*, 57 Ala. —.

It is questionable whether in the absence of statutes authorizing it, a guardian had authority to loan the moneys of his ward on personal security merely. Whether he had or not, it is certain, that if he made a loan without any other security than the personal obligation of the borrower, he incurred a liability to the ward for the money loaned, though the borrower was of undoubted credit and solvency.—*Lee v. Lee*, 55 Ala. 590. The statutes expressly declare that "he must, if practicable, lend out all surplus money of the ward on bond and mortgage, or on good personal security."—Code of 1876, § 2773. Therefore, when the guardian, without

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taking security of any kind, loaned the money of the ward, a *devastavit* was committed, rendering her and her sureties liable. From this liability she could not be discharged by a subsequent collection of the debt from the borrower. It was within the election of the ward to treat the original loan as a conversion of the assets, or to ratify it as a proper administration. Of the right of election, she could not be deprived by the act of the guardian. The only Confederate treasury-notes received by the guardian were received on this unauthorized loan, and they were not assets of the ward's estate. *Walls v. Grigsby*, 42 Ala. 473. While we have no inclination to depart from our repeated decisions, that a trustee who in good faith, and in the exercise of reasonable diligence, received Confederate treasury-notes, in satisfaction of debts due him in his representative capacity, while they were the circulating medium, and usually employed in the payment of debts, and the transaction of business, is not liable for a *devastavit*, merely because they were rendered worthless by the results of the war; they can not be, and have not been extended so far, that the trustee will be exonerated from liability for a conversion, by receiving them from a borrower to whom he had made an unauthorized loan of trust moneys. The conversion involves him in liability, from which he can not be relieved until satisfaction is made to the *cestui que trust*. The debt contracted by the borrower is his individual property, unless the *cestui que trust* elects to treat it as assets, and when the trustee collects it, in the absence of an election by the *cestui que trust*, it is his own debt he collects. While there is nothing in the pleadings and evidence, which can raise a doubt as to the good faith of the guardian, and of the borrower from her, good faith alone will not excuse. Good faith and reasonable diligence, must be united with the observance of duty and authority as declared by law. If these are violated, however just and pure may be the intention, and however discreet the act, a liability results for all losses which may ensue.

A guardian is entitled to a credit only for moneys actually expended for the ward, or for necessities he may actually supply. The *onus* of proof is upon him, and no credit can be allowed him, whether it be for money expended, or necessities supplied, unless the evidence is of that character, which would support an action at law, if the guardian was suing the ward, in an action *ex contractu*.—*Hutton v. Williams*, *supra*, and authorities cited. Applying this principle to the exceptions to the report of the register, they were properly overruled.

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But in decreeing that in the first instance execution should issue against the appellant, rendering him primarily liable, and relieving his co-surety from the common burthen imposed by the bond, the chancellor erred. The rule of practice is, that a defendant to obtain relief against a co-defendant, must resort to a cross-bill.—3 Dan. Ch. Pr. 1743. If an equity exists which compels the appellant to bear the burthen of the common obligation, in ease and in exoneration of his co-surety, it is not the office of a petition, but of a cross-bill, to present it for the judgment of the court. In this respect, the decree of the chancellor must be reversed and annulled, but in all others it is affirmed.

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Prosecution for use of Vulgar Language in Dwelling-house, &c.

1. *Code, § 4203 of ; construed.*—The statute against the use of abusive, vulgar, or insulting language, (Code, § 4203) is not violated, unless such language is used at a place, and in the presence of the persons, or some one of them, specially mentioned in the statute.

2. *Same ; indictment, when defective.*—A statement filed on appeal to the Circuit Court, or an indictment therein, for this offense, is fatally defective, if it fails to aver such presence.

3. *“Curtilage,” as used in this statute ; meaning of.*—The “curtilage,” within the meaning of this statute, includes the yard, garden or field, which is near to and used in connection with the dwelling, though not enclosed.

APPEAL from Sumter Circuit Court.

Tried before Hon. L. R. SMITH.

The appellant, Ivey, was prosecuted before the County Court, for a violation of the statute (Code, § 4203), against the use of abusive, vulgar or insulting language in the dwelling-house of another, or upon the curtilage thereof, &c. Having been convicted, he appealed to the Circuit Court, where he pleaded not guilty. The jury found him guilty and assessed a fine, and judgment was rendered accordingly.

The statement filed by the solicitor in the Circuit Court, charged that within twelve months before the commencement of the prosecution, the defendant “did enter the dwelling-house of Jerry Sledge, or upon the curtilage thereof, and

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made use of insulting, vulgar or abusive language, against the peace," &c.

When the abusive language was used by the defendant, "he was near the house of Jerry Sledge, a freedman, between the door of Jerry's house and the door of his kitchen, and about five feet from the door of the house to which he (defendant) had just ridden." The house was some five hundred yards from the public road, and in an open field, not surrounded by any fence or enclosure whatever. The defendant and the prosecutor both lived on the lands of one Sprott, who had directed the defendant to prevent the burning of rails on the premises. The conversation in which the defendant used the abusive language, commenced by defendant's expostulating with Jerry about burning the rails.

The foregoing is the substance of all the evidence material to the questions involved.

The court charged the jury, among other things, that "although there was no fence enclosing the house, yet if they believed from the evidence, beyond all reasonable doubt, that the defendant entered upon the premises of said Sledge, and within the space ordinarily enclosed by a fence and used as a yard about the house, and made use of insulting, abusive or vulgar language, in the presence of a member of his family, then he would be within the prohibition of the statute, and would be guilty." The defendant excepted to this charge, and asked the court in writing to charge the jury, "that unless they believe from the evidence that the defendant had the purpose in his mind to use insulting, vulgar or abusive language, at the time he entered upon the premises, he can not be convicted."

The court refused to give this charge, and the defendant excepted.

SNEDECOR & COCKRELL, for appellant.—1. The statement is defective, and charges no offense. The *presence* of the owner, or of some member of his family, must be shown. Code, § 4203.

2. Charge given by the court of its own motion, is erroneous. The legislature has sought, by carefully guarded language, to protect families or females from impropriety of language, when it is uttered by one intruding, 1st, in the dwelling-house; 2nd, upon the curtilage thereof.

"The case not falling within the terms of the first inhibition, and being dispunishable unless it does, the court below sought to supply, by interpretation, what it must have con-

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sidered a *casus omissus*," and extended the prohibition to an indefinite distance, "within the space ordinarily enclosed by a fence and used as a yard about the house."

The technical term "curtilage," when incorporated in this statute, had a well defined technical signification: "The enclosed space immediately surrounding a dwelling-house, contained within the same enclosure.—10 Cush. Mass. 480; 43 Ala. 20.

The court erred in refusing the charge requested. The language of the statute is not, "if any person being in the dwelling-house of another, or upon the curtilage thereof, uses," &c.; but the language is, "*enters into* the dwelling, or *upon* the curtilage, AND in the presence," &c. The construction put by the court, in effect eliminated therefrom the verb "enters," the conjunction "and" preceding "in presence of;" and also the conjunction "and" preceding "makes use of."

HENRY C. TOMPKINS, Attorney-General, *contra*.—The statute was intended to protect the *home*, or the members of the household while in its sacred precincts, from the annoyance and mortification occasioned by the use of such language in their presence. A place to be within the curtilage of a dwelling, need not be within some enclosure separating the dwelling from the land around, for, as says a Maine judge, "the curtilage of a dwelling-house is a space necessary and convenient and habitually used for the family purposes, the carrying on of domestic employments, and need not be separated from other lands by fence."—*Shaw v. State*, 31 Me. 523; 3 Whart. Crim. Law, § 1669; 1 Bishop Crim. Law, § 171.

The charge given by the court went even further, for it required the jury to believe, not only that it was in the space so used, but that it was also within the space ordinarily enclosed.

The intent, the existence of which is necessary to constitute the crime denounced by the statute, is the intent to use language of the character forbidden thereby, and it is evidenced by its use. To make the offense, it is only necessary that the intent and act should concur in point of time. It is not necessary that the intent should have existed at any specified time prior to the act. There was no error in the refusal of the court to give the charge asked.—1 Bishop Crim. Law, § 80.

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BRICKELL, C. J.—This prosecution originated in the County Court, and after conviction, was carried by appeal to the Circuit Court. The charge is a violation of the statute prohibiting the use of abusive, vulgar, or insulting language in the dwelling-house of another, or upon the curtilage thereof, or upon the public highway near such premises, *and in the presence of the family of the owner or possessor thereof, or of any member of his family, or of any female.* Code of 1876, § 4203. The trial on the appeal to the Circuit Court is *de novo*, without any indictment or presentment by the grand jury, but the solicitor is required to file a brief statement of the offense charged, a form of which is given, which indicates the offense must be described as in an indictment.—Code of 1876, § 4729. A statement was filed, charging the defendant with an entry into the dwelling-house of another, or upon the curtilage thereof, and the use of abusive, vulgar, or insulting language, but omits to charge the presence of the owner or possessor, or of his family, or of any member thereof, or of any female. The offense is statutory, not existing at common law, and an indictment, or the accusation which must be filed on appeal from the County Court, is insufficient, unless it avers the facts which the statute declares are constituents of it. It is the protection of the persons who are particularly mentioned from insult, the statute is intended to secure; and their presence, or the presence of some one of them, is as material to constitute the offense, as the use of the abusive, insulting, or vulgar language, or the places at which the language is used. The statement is insufficient, and does not support the judgment.

Whatever may have been the signification of the word *curtilage*, as employed at common law in reference to burglary, we can not doubt that in this statute, it includes the yard, or garden, or field, which is near to and used in connection with the dwelling. It is not necessary either should be surrounded by an enclosure. It is the propinquity to the dwelling, and the use in connection with it for family purposes, which the statute regards, and not the fact of its enclosure.—Bish. Stat. Crimes, § 286; *State v. Shaw*, 31 Me. 523. There was no error in the charge given, or in the refusal of that requested.

For the error pointed out, the judgment must be reversed and the cause remanded. The appellant will remain in custody until discharged by due course of law.

[Haynie, Adm'r, v. Miller, Adm'r.]

Haynie, Adm'r, v. Miller, Adm'r.*Action on Receipt.*

1. *Husband and wife, what not contract between, within prohibition of statute.*—A receipt given by the husband to his wife, acknowledging that he had received from her a certain amount of her money, for investment, with a like amount of his own, in certain exchange which he purchased, and that the wife was entitled to one-half of the proceeds when sold,—is not a contract between husband and wife, within the meaning of the statute forbidding their contracting with each other.

2. *Same; what complaint discloses substantial cause of action.*—A complaint by the wife's administrator against the husband's personal representative, claiming a sum certain as due according to such receipt, which is set forth, discloses a substantial cause of action; and no demurrer having been interposed in the court below, there can be no reversal here for defects in the complaint.

3. *Same; burden of proof.*—The husband's receipt is an admission that the money rightfully belonged to the wife, and *prima facie* entitles her to a recovery; if her right to the money is denied, it must be disproved by those who controvert it.

APPEAL from the Circuit Court of Mobile.

Tried before Hon. HENRY T. TOULMIN.

The appellee, Haynie, as administrator of the estate of Mrs. Kelly, sued appellant, Miller, as administrator of the estate of Mrs. Kelly's late husband, E. H. Kelly, who died leaving his wife surviving him, for \$750 and interest, claimed to be due according to "a certain receipt made by the said E. H. Kelly," of the tenor following: "Received, Mobile, July 2d, 1861, from Mrs. J. A. Kelly, her check B. of Mobile for \$750, to be invested with me in a check of \$1500, in sterling, which was obtained from the Bank of Mobile on Messrs. Williams, Deason & Co., bankers, London, for £321: 8, 7, being @ \$1.05. This check when sold to be divided, and Mrs. J. A. Kelly to receive $\frac{1}{2}$ of all profit or $\frac{1}{2}$ loss. Check No. 767 Bank of Mobile. (Signed) E. H. Kelly."

The case was tried on the plea of the general issue, and resulted in verdict and judgment for the plaintiff.

The only evidence introduced was the receipt declared on, and the record of a chancery suit which Mrs. Kelly, in her life-time, instituted against appellant, as administrator of her deceased husband, to enforce the collection of the demand here sued on. This bill was dismissed without prejudice to

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her right to sue at law. In the chancery cause, Mrs. Kelly and another witness were examined; but neither of them state definitely how or where Mrs. Kelly obtained the money, and she spoke of it as her "separate estate."

The court, at the request of the plaintiff, charged the jury, if they believed the evidence to find for the plaintiff, and refused a written request of defendant asserting the contrary. Exception was duly reserved to the charge given, and the refusal to charge as requested, and they are now assigned as error.

E. S. DARGAN, for appellant.

THOS. H. PRICE, *contra*.

MANNING, J.—No demurrer was interposed to the complaint before us, and under our statute it must be held sufficient. What it claims is a sum of money as due according to "a certain receipt," a copy of which is set forth.

For the defense, it is insisted under the general issue, that the writing was a contract between husband and wife, which is legally void; and that the action between the present parties could not be maintained in a court of law.

The writing may be regarded as, in effect, a certificate given by Mr. Kelly to his wife at the beginning of the late civil war, as evidence that he had received from her \$750 to be added to a like amount of his own and converted into English sterling funds; that he had so converted it by obtaining a check on bankers in London for £321 8s. and 7d.—and that Mrs. Kelly was entitled to one-half of this and he to the other. We do not think this a contract which the law inhibits between the husband and wife.

Though evidence was introduced on the subject, taken in the chancery cause, it is not shown how or where Mrs. Kelly obtained her money. But the law permitted her to own it as of her separate estate either equitable or statutory; and her husband who might lawfully surrender it to her absolute control and use, acknowledged by the writing he gave to her, that she had money to her separate account and credit in the bank, \$750 of which he received as hers.

Without evidence to support him, the defendant, as administrator of E. H. Kelly, is not entitled to deny that this money honestly belonged to Mrs. Kelly as her separate property. If it was of her statutory separate estate, the act expressly gives her a right of action in her own name, to recover

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the *corpus* from any one, except her husband; and if it belonged to her equitable separate estate, then when she became *discoverd* by the death of her husband, she could sue his executor or administrator at law.—*Jenkins v. McConnico*, 26 Ala. 246; *Andrews and Wife v. Huckabee's Administrator*, 30 Ala. 143.

No question was made as to the amount of interest defendant might retain as income that accrued in the husband's life-time, for which he was not accountable.

We think there was no error in the rulings of the Circuit Court.

Let the judgment be affirmed.

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Indictment for Assault and Battery.

1. "*Range line number five*," meaning of, as used in act to change boundary line, &c.—The expression "*range line number five*," found in the act to change the boundary line between the counties of Blount, Walker and Jefferson, &c., providing that the county line between Blount, Walker and Jefferson counties shall commence at a point where Blount, Cullman and Walker counties meet or corner, and shall run thence due west, *to range line number five (5) west*, is a verbal inaccuracy; as under our system of surveying and numbering the public lands, the lines dividing the ranges are not numbered.

2. *Same*.—The legislature intended by the use of the words, "*Range line number five*," in said act, to indicate the line which is the eastern boundary line of range number five, and divides ranges number four and five; and hence left all of "*Range five, west*," in Walker county.

APPEAL from Circuit Court of Walker.

Tried before Hon. W. S. MUDD.

The appellant was convicted of an assault and battery. On the trial it was proved that the assault and battery took place in section sixteen (16), township fourteen (14), range five (5), west, and that that section, township, and range had been for years, and still was a part of the territory of Walker county, unless the same has been detached from said county, under the provisions of an act "to change the boundary line between the counties of Blount, Walker and Jefferson, and to authorize the removal of the county seat of Blount county." So much of that act as is material is as follows: "The county line between Blount, Walker and Jefferson counties

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shall commence at a point where Blount, Cullman and Walker counties meet or corner, and shall run thence due west to range line number (5) five, west," &c. The appellant requested the following written charge: "That if the jury shall believe from the evidence that the assault and battery alleged in the indictment, were committed in section 16, township 14, range 5, west, that the offense was not committed in Walker county, and they must find the defendant not guilty. The court refused this charge, and he excepted.

A. H. McCLUNG, and T. H. WATTS, Sr., for appellant.

H. C. TOMPKINS, Attorney-General, *contra*.

STONE, J.—In the act "To change the boundary line between the counties of Blount, Walker and Jefferson, and to authorize the removal of the county seat of Blount county," Pamph. Acts 1876-7, p. 229, it is declared "that the county line between Blount, Walker and Jefferson counties shall commence at a point where Blount, Cullman and Walker counties meet or corner, and shall run thence due west to range line number (5) five, west," &c. The lines which divide and separate our lands into ranges, townships and sections are not numbered. A line is but an extension of a point, and while it has length, it has neither breadth nor thickness. Ranges and townships are intended to be six miles wide, and are proximately so. Ranges extend north and south, parallel with each other, and are separated by lines. These ranges, or spaces of six miles width, commencing at a base, or meridian line, are numbered with rising, consecutive numerals, going both east and west. Hence, we have range 1 east, range 1 west, and so on. Starting at the meridian, or basis of survey, and going west, we travel six miles in range one west. Then crossing the line, we enter range two west, which also extends six miles. Now, the line which separates ranges 1 and 2, is alike the line of each range. It can not, with accuracy, be expressed or defined by number. If we call it range line one, because it is a line of range one, it is equally a line of range two; but, it is only the eastern line. There is another line or boundary of range two, known as the western, which is, in its turn, the line or boundary of two ranges, 2 and 3. As well speak of a section line by numbers, when it is a quadrangle having four lines or sides, as to characterize a range line by numbers. This is a verbal inaccuracy, which occurred in draughting,

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engrossing, or enrolling the bill. Chancellor KENT, 1 Com. 468, marg. says, "It would be quite visionary to expect, in any code of statute law, such precision of thought and perspicuity of language as to preclude all uncertainty as to the meaning, and exempt the community from the evils of vexatious doubts and litigious interpretations." And he quotes Lord COKE as saying, with characteristic brusqueness, that in his day great questions had oftentimes arisen "upon acts of Parliament, overladen with provisos and additions, and many times on a sudden penned or corrected, by men of none, or very little judgment in law." We do not adopt this last phrase in its whole extent; but in our professional experience we have found many men who were bewildered by the terms in which our land surveys and divisions are expressed.

We have said that "range line number five" is a verbal inaccuracy. We find nothing in the other portions of the act which aids us in its interpretation. We would accord to every word in the statute some meaning, if we could. We have consulted the rules of interpretation as laid down by eminent authors, and find nothing in them which sheds any light on this question. The nearest approach we can make to a satisfactory solution, is to treat these words as the synonym of *line of range number five*. But there are two lines of range number five west—the one bounding it east, and the other bounding it west. Which of these lines was meant? The line described, after stating its initial point, ran west. "Thence due west," is the language of the statute. When it reached the first and nearest line of range five, it complied with every requirement of the statute. It had then reached line of range number five, and was required to go no further. We are convinced that the act under discussion left all of range five west in Walker county, and that the Circuit Court did not err in so ruling.

Affirmed.

[Helmetag v. Frank.]

Helmetag v. Frank.

Bill in Equity to Foreclose Mortgage, &c.

1. *Equitable separate estate; what creates.*—A gift by the husband to the wife, of property real or personal, creates in the wife an equitable separate estate, and property thus acquired is not within the operation of statutory or constitutional provisions which create the separate estate.

2. *Same; incidents of.*—An incident of an equitable separate estate is the power of the wife to alienate or charge it, as if she were a *femme sole*, unless restrained by the instrument creating it. She may mortgage it as security for her own debt, or that of the husband.

3. *Evidence of debt; renewal of, effect of.*—The renewal of the evidence of a debt secured by mortgage, is not a payment; nor does it impair the lien of the mortgage.

4. *Variance between allegation and proof; effect of.*—The pleadings and proof must correspond, and a material variance between them, however clear may be the equity of the complainant, is fatal to relief.

APPEAL from the Mobile Chancery Court.

Heard before Hon. H. AUSTILL.

The appellee, Minna Frank, filed her bill against the appellant, Amelia Helmetag, and her husband, seeking to foreclose a mortgage executed by them on a certain house and lot in the city of Mobile. The bill alleges that F. W. Helmetag, the husband of the appellant, was seized in fee of the premises, and that both he and his wife claimed that he was so seized; that being so seized in fee, and he and his wife so representing, they applied to appellee for a loan of \$1,320, to be secured by a mortgage on the property in controversy; that the appellee then loaned them the money, for which she took their joint note, payable to her twelve months after date, at the Mobile Savings Bank. The original note was secured by the mortgage sought to be foreclosed, and not having been paid at maturity, was surrendered to appellant and her husband, and they executed another joint note for the same amount, payable at twelve months. This last note was, at maturity, extended for a year, and has not been paid.

The bill prays a sale of the mortgaged property, and for general relief. Sworn answers were required, and the defendants filed separate answers under oath. The answer of the husband denied that he ever represented to appellee that the mortgaged property belonged to him, and stated that it was the wife's property, and that the appellee knew it

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belonged to her; that the money was loaned to him alone, and that the wife had never received any of it, or any benefit of it; that she was merely security on the note, and mortgaged the property to secure it.

The answer of the wife also denies that she ever represented to appellee that the property in controversy belonged to her husband, but avers that it then was and still is, her statutory separate estate, by conveyance from her husband upon consideration of love and affection, while he was fully solvent and unembarrassed, long before the debt to appellee was contracted. The deed was made an exhibit to the answer. This deed was made in consideration of natural love and affection, and gave, granted and conveyed the property, to said Amelia Helmetag, "her heirs and assigns forever, to have and to hold unto her the said Amelia Helmetag, her heirs and assigns forever." The cause was heard on bill and answers, and the chancellor rendered a decree granting the relief prayed, and ordering a sale of the mortgaged property, &c. From that decree this appeal is taken.

ST. PAUL & LABUZAN, for appellant.—The deed from appellant's husband to her, contained no words which excluded his marital rights; and hence it created in her a statutory separate estate. While at common law the direct deed of the husband to the wife, passed nothing until the death of the husband, a court of equity, if called upon, would hold it good as vesting an estate in the wife. The statute now confers capacity upon the wife to take and hold the estate; and no reason exists to call into exercise the powers of a court of equity to effectuate the intention of the donor. The true rule in determining whether the estate of the wife is equitable or statutory is: Does the instrument creating it exclude the marital rights of the husband? Measured by this rule the deed created in Mrs. Helmetag a statutory estate, and it is clear that neither she, nor her husband, nor both, could mortgage it, for any purpose whatever. Again, the note secured by the mortgage was paid by the substituted note and the mortgage thereby satisfied.—See 2 La. Ann. 175; 4 La. Ann. 543; 6 La. Ann. 774; 10 La. Ann. 623. The variance between the allegations of the bill and the proof, was fatal, and the bill should have been dismissed. 19 Ala. 698; 18 Ala. 353; 22 Ala. 602; 28 Ala. 613; 29 Ala. 353.

FREDERICK G. BROMBERG, *contra*.—A gift from the husband.

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band to the wife, in consideration of love and affection, and without words of limitation, creates in the wife an equitable separate estate, which she holds as a *femme sole*, and which she may bind by any contract of hers. The deed in this case created in appellant an equitable separate estate, and by joining in the note and mortgage to appellee, she rendered it subject to the debt.—See 30 Ala. 358; 23 Ala. 816; *McMillan v. Peacock*, 57 Ala. The renewal of the note secured by the mortgage did not satisfy the mortgage, which still remained a security for the substituted note.—1 Dan. on Neg. Inst. 164, § 205; 24 La. Ann. 193.

BRICKELL, C. J.—1. We regard it as the settled law of this State, that a gift by the husband to the wife of property real or personal, creates in the wife an equitable separate estate. Property thus acquired by the wife, is not within the influence and operation of the statutory or constitutional provisions which create separate estates.—*McMillan v. Peacock*, 57 Ala. 127, and authorities cited. An incident of an equitable separate estate, is the power of the wife to alienate or charge it, as if she were a *femme sole*, unless restrained by the instrument creating it. She may mortgage it as security for her own, or for the debt of her husband.—*McMillan v. Peacock*, *supra*.

2. It is also well settled, that the renewal of the evidence of a debt secured by mortgage, is not a payment; nor does it impair the lien of the mortgage.—*Boyd v. Beck*, 29 Ala. 703. The complainant consequently on the proof was entitled to a decree of foreclosure.

3. To support a final decree, the pleading and proof must correspond, and a variance between them, however clear may be the equity of the complainant, is fatal.—*Crabb v. Thomas*, 25 Ala. 212; *Skinner v. Barney*, 19 Ala. 698. The averment of the bill is that the husband was seized in fee of the premises, and that he and the wife *alleged* that he was seized in fee. The latter averment is immaterial and must be rejected as surplusage. The material fact which should have been stated, was as to the title of the wife, and that it was a title, which notwithstanding her coverture, she had capacity to transfer by mortgage. The title shown by the bill resided in the husband at the execution of the mortgage; and though the wife may have joined in its execution, the legal consequence is, that thereby only her contingent right of dower was conveyed. The proof shows that the title resided in the wife, under a conveyance from the hus-

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band, creating an equitable separate estate, she had the capacity to charge by mortgage. The variance compels a reversal of the decree.

Reversed and remanded.

Koopman v. The State.

Violation of Revenue Law.

1. *Engaging in or carrying on business, within the meaning of the revenue law.*—One who, without license, engages in the business of selling liquor in quantities of a quart or more, is a wholesale liquor dealer within the meaning of the law, and guilty of a violation of its provisions, though the liquor was kept and sold by way of variety merely, “rather to accommodate regular customers than for profit, and constituted a minor part of a general merchandise business,”—if thereby the dealer intended to reap a profit, directly or indirectly in his business.

2. *Same; indictment, when bad.*—An indictment which charges merely that the defendant engaged in or carried on the business of a wholesale liquor dealer at a specified place, against the peace, &c., is fatally defective; to constitute a charge for violation of the revenue law, it should aver that the business was carried on without license.

APPEAL from the Circuit Court of Cullman.

Tried before Hon. LOUIS WYETH.

Appellant, Koopman, was convicted under an indictment which charged, that before the finding thereof, “he did engage in the business of a wholesale dealer in spirituous, vinous, or malt liquors, in a town of less than one thousand inhabitants, against the peace and dignity of Alabama.” Having reserved exceptions to the refusal of a charge requested, he brought the case here by appeal. This charge is set forth in the opinion.

H. L. WATLINGTON, for appellant.

H. C. TOMPKINS, Attorney-General, *contra*.

MANNING, J.—This was intended to be a prosecution of appellant, under the revenue law, for being engaged in and carrying on contrary to its provisions, the business of a wholesale dealer in spirituous, vinous, or malt liquors. Defendant was found guilty, and sentenced to pay a fine therefor.

A bill of exceptions was taken setting forth that an excep-

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tion was reserved to the refusal of the circuit judge to charge the jury at request of defendant, that if they "believed from the evidence that the defendant was engaged in a general merchandise business, and kept whiskey for sale merely as a variety of his stock, and rather to accommodate his regular customers than to derive profit, and as a minor part of his business, the defendant should not be convicted, unless they also believe that he was using his general merchandise business as a mere cloak for his real intent to engage in the business of a wholesale dealer in whiskey." The meaning of this charge is, that defendant should be found "not guilty" unless dealing in whiskey was a principal part of his business. The charge was properly refused.

In *Weil v. The State*, 52 Ala. 19, we held that it was not essential to the violation of the provisions of the revenue law on this subject, that the vending of the liquors specified should be the principal business of defendant. The inquiry should be—was it his purpose to derive profit therefrom? "It may be" (said BRICKELL, C. J.,) "that profit was not expected from the particular business, but from some other business which the particular business would increase, and by increasing, the profits would be enlarged. If . . . appellants kept and sold spirituous liquors in quantities of a quart or more, they would be guilty as charged in the indictment, if from the keeping and sale of liquors they did not expect a profit otherwise than by an increase of their sales as general dry goods merchants." The charge refused by the circuit judge was directly in conflict with the doctrine thus laid down.

But the judgment must be reversed for a reason not assigned, or urged for appellant. It was intended to prosecute him for engaging in the business of selling liquors of the kind specified, without having paid for and obtained a license as required by the revenue law. But there is no allegation in the indictment that he had not paid for and obtained the license; no averment showing that he had done any thing contrary to that law. There is consequently no foundation for the judgment of the circuit court, which must be reversed and the cause remanded.

[Greene County v. Hale County.]

Greene County v. Hale County.

Action to recover Compensation of Jurors trying a Case on Change of Venue.

1. *Costs; liability of State or county for.*—Neither the State nor the several counties thereof, are liable for costs incurred in the prosecution of offenders against the laws, except to the extent, and in the manner, provided by statute.

2. *Code of 1876, section 4917 construed.*—Under the provisions of the Code (§ 4917) when a prosecution begun in one county, is transferred by change of venue to another county, "all fines and forfeitures go to the county in which the indictment was found, and judgment must be rendered accordingly; and the fees of all jurors and witnesses, on being properly certified by the clerk of the court to which the trial is removed, are a charge on the county in which the indictment was found, in like manner as if the trial had not been removed."

3. *Same.*—Under this section, fees of persons summoned as special jurors, for the trial of an indictment which has been transferred on a change of venue, when properly certified, are payable by the county in which the indictment was found, and not by the county to whose courts the trial was transferred; and if the latter county pays them, it is a voluntary payment, which will not constitute it a creditor of the county in which the indictment was found.

APPEAL from Greene Circuit Court.

Tried before Hon. L. R. SMITH.

The opinion states the facts. The main error relied on was the action of the court below in overruling a demurrer to the complaint, on the ground that it disclosed no substantial cause of action.

THOMAS W. COLEMAN, for appellant.—The declaration shows on its face that Hale county, the plaintiff, could not own the character of claims sued on. The debt is due directly to the jurors summoned.—Revised Code, §§ 4345, 4212. Again, these claims were paid and absolutely extinguished by the treasurer of Hale county. He had no authority to do it, and the county can not ratify an unauthorized act, and thereby acquire a right of action by implication against Greene county. An implied contract will never be found, where an express contract could not be made. If the treasurer of Hale county paid the money in ignorance of the law, while he knew the facts, it can not be recovered back.—21 Ala. 750; 2 Brick. Dig. p. 326, § 45.

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W. P. and JAS. E. WEBB, *contra*.—The law clearly imposed on Hale county the duty of paying persons summoned to serve as jurors in its court, no matter whether summoned to try cases brought there by change of venue, or commenced in the courts of that county. Section 4212 of the Code of 1876, which declares that jurors' fees are a charge upon the county where the prosecution originated, did not alter or change the law. That section was merely declaratory of the common law applicable to such subjects. Sedg. Stat. and Const. Law, 37; Dwarris on Stat. vol. 2, p. 473. The question was determined under the common law, uninfluenced by statute, in 2d Murphy (N. C.) 244. In that case it was ruled that the county where the prosecution originated was entitled to the fine, and liable to the costs of prosecution, in a case where a change of venue was had. The same doctrine is asserted by the Supreme Courts of Pennsylvania, Indiana and Maryland, whose county organizations are substantially identical with ours, and whose statutes on the subject are not materially variant from those of this State.—See 29 Penn. St. 38; 1 Smith (Ind.) 133; 30 Md. 432; 4 Kansas, 312.

MANNING, J.—The State is not chargeable with costs created in the prosecution of a person indicted for a violation of law, whether the defendant be convicted or acquitted, unless it has consented or provided by statute that they may be charged against it. Nor are the counties respectively liable for the costs in State cases arising or tried therein, except to the extent and in the manner declared and enacted by the legislature. Hence, it is to the written law we must look, to ascertain what liability, if any, there is in the present case on the part of Greene county to Hale county. The latter sued for the amount of jurors' certificates paid by it, to persons summoned term after term from 1872 to 1875, to serve on juries for the trial therein of one Bob Murray, for murder alleged to have been committed by him in Greene county, from which the cause was transferred by a change of venue to Hale.

By section 5049 (4345) of the Code of 1876—fees are allowed to persons summoned to serve as jurors; and the clerk is authorized to deliver to each of them a certificate for the sum he is entitled to; which (it is declared) shall be "receivable in payment of any county dues, and payable out of the county funds." By sections 4459 and 4460, fees to witnesses for the State are also in certain contingencies,

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allowed against the public. And they must be certified in like manner and paid "out of any fines and forfeitures in the county treasury." Such is the general law on these subjects, relating to State cases; nearly all of which, of course, have their origin in the counties in which they are tried.

But sometimes a prosecution begun in one county is transferred, by change of venue, to another. And it is enacted that "all fines and forfeitures in such cases, go to the county in which the indictment was found, and judgment must be rendered accordingly; and the fees of all jurors and witnesses, on being properly certified by the clerk of the court to which the trial is removed, are a charge on the county in which the indictment was found in like manner as if the trial had not been removed."—§ 4917 (4212).

We can not doubt that in the cases in which a change of *venue* is obtained, the fees here referred to must be paid by the county in which the indictment was preferred, "in like manner as if the trial had not been removed,"—that is, upon the presentation of the certificates by the respective holders of them, to the officer of that county whose duty it is to pay them, and out of the funds designated by law. The statutes in fact, make these certificates, or the costs of which they are the evidence, chargeable in all cases, upon the counties in which the prosecutions are instituted, and upon no other.

There may be as argued, difficulty sometimes in carrying these laws into effect according to this construction. And it may be inconvenient to jurors residing in Hale county to have to go or send to Greene county for their fees. The opposite construction would not make it less so, to another class of certificate-holders. The statute last cited relates to the fees of witnesses as well as jurors. And the witnesses in this cause, resided, presumably, in Greene county, where the homicide was committed. And if the jurors must look to Hale county for payment, so must the witnesses, who live in Greene county, go or send to Hale county, for their fees. It is probable these statutes need revision and amendment. But we can not give to them the operation contended for without judicial legislation.

The fees here sued for, were due, not from Hale county to the holders of the certificates, but from Greene county; and by its treasurer, if duly presented to him from time to time, as issued, they should have been paid. Hale county could not, by voluntarily paying them, make itself the creditor of Greene county, for the money paid without its request.

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The judgment of the Circuit Court must be reversed, and the cause be remanded.

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Indictment for selling or giving Vinous, Spirituous, or Malt Liquors to Minors.

1. *Charge; what erroneous.*—A charge given by the court, of its own motion, which authorizes a conviction, though the offense was not committed within the county, and within the period prescribed as a bar to the prosecution, is erroneous, and compels a reversal.

2. *Age of witness; what evidence of admissible.*—A witness may testify to his own age, though he states that his knowledge is derived from what his mother told him; and the fact that his mother, who was not shown to be dead, or out of the jurisdiction of the court, was not introduced, does not affect the admissibility of the evidence, though the jury may consider it, with the other circumstances of the case, in determining its credibility.

3. *Charge; when properly refused.*—A charge based on a state of facts, of which there is no evidence, is abstract, and properly refused.

4. *Code, section 4205; construed.*—Under section 4205 of the Code, a sale or gift of liquor to any of the class of persons therein mentioned, is unlawful, unless made “upon the requisition of a physician for medicinal purposes,” and this “requisition” must be a verbal or written application or request to the seller by the physician himself.

5. *Illegal act; presumptions as to intent to commit.*—Whenever one does an act which is in itself illegal, the law presumes the intent to do that act, and the act of itself is evidence of the intent; hence where one sells or gives spirituous liquors, &c., to a minor, &c., without the requisition of a physician, the gift or sale is evidence of the intention, and there can be no inquiry as to whether the defendant had the “specific intent” to violate the law.

APPEAL from Marshall Circuit Court.

Tried before Hon. LOUIS WYETH.

The indictment under which the appellant was tried and convicted, is framed under section 4205 of the Code of 1876, and charges, that he “did sell or give vinous, spirituous or malt liquors to James Foreman, a minor, against the peace,” &c. The only evidence on the trial was the testimony of said Foreman. He testified that, “within the county and within the period of twelve months before the finding of the indictment, he had on two several occasions obtained from the defendant in person some whiskey. The first time he got a quart, the second time a quart or a pint. Upon the first occasion he was sent by his mother, a neighbor of defendant, to the defendant with instructions to get for her a quart of whiskey. Obeying the instructions of his mother,

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he went to defendant's house and told him that his mother had sent him for a quart of whiskey, and that she wanted it to use in the treatment of measles, which prevailed in his mother's family; that he was about seventeen years old when he got the whiskey. On the other occasion, he was sent to defendant by his brother, who was a man of full age, to get some whiskey, and the whiskey was delivered to him by defendant, and was carried by him to his brother." On cross-examination he was asked how he knew his age, to which he replied, "his mother told him so." This answer was objected to, on the ground that it was hearsay. The witness further testified that on neither occasion did he use any of the whiskey, but delivered the same to his mother and brother; that the measles prevailed in the family, and Dr. William Johnson, the attending physician, directed his mother to get some whiskey for use in the treatment of the disease. This was all the evidence, and the court of its own motion charged the jury as follows: "If you believe, from the evidence, that the defendant sold or gave to James Foreman vinous, spirituous, or malt liquors, and that James Foreman was a minor at the time of such giving or selling, and beyond a reasonable doubt, you will find the defendant guilty, and assess a fine against him of not less than fifty, nor more than five hundred dollars." The defendant duly excepted to this charge.

The defendant requested separately the following written charges, which the court refused:

"1. That the evidence of James Foreman, to whom the vinous, spirituous or malt liquors are alleged to have been sold or given by the defendant, as to his age, if based upon hearsay, is a fact or circumstance to be considered by the jury, as to whether he is a minor or not.

"2. That the hearsay evidence objected to by defendant, can not be considered by the jury, in the determination of this cause.

"3. If defendant did give, or sell, vinous, spirituous, or malt liquor to said James Foreman, believing him to be of full age, then this is a circumstance to be weighed and considered by the jury, in the determination of the guilt or innocence of the defendant.

"4. That the intention of the defendant is an essential ingredient in this offense, and the intention must be shown beyond a reasonable doubt, before the jury can convict.

"5. That the specific intent must exist in the mind of the seller or giver, at the time of selling or giving vinous, spir-

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ituous, or malt liquors to a minor, knowing him to be a minor, before the jury can find him guilty.

"6. If the jury believe, from the evidence, that the witness, James Foreman, who obtained the vinous, spirituous, or malt liquors from the defendant, was sent by his mother to get said vinous, spirituous, or malt liquors for her own use, or to be used by her for medicinal purposes, then these alone do not constitute the offense denounced by the statute, and the defendant is not guilty.

"7. If the jury believe, from the evidence, that the whiskey was given to James Foreman, to be delivered to his mother for medicinal purposes, and was not given or sold to him for his own use,—then this defendant is not guilty."

The court refused each of these charges, and the defendant duly excepted.

The admission of the evidence objected to, the charge of the court, and the refusal to charge as requested, are now assigned as error.

No counsel appeared for appellant.

H. C. TOMPKINS, Attorney-General, *contra*.

BRICKELL, C. J.—1. The judgment in this cause must be reversed, because the charge given by the court of its own motion, authorized a conviction, though the jury may not have believed from the evidence, that the offense charged was committed in the county of Marshall, within twelve months before the commencement of the prosecution. It has often been decided in this court that a charge is erroneous, which authorizes a conviction of a criminal offense, without proof that the offense was committed in the county in which the indictment was found.—*Solomon v. The State*, 27 Ala. 27; *Brown v. The State*, ib. 47; *Huffman v. The State*, 28 Ala. 48; *Green v. The State*, 41 Ala. 419. So it has also been decided, that a charge is erroneous based upon a hypothetical state of facts, not including proof of venue, and the commission of the offense, within the period prescribed as a bar to its prosecution.—*Farrall v. The State*, 32 Ala. 557; *Henry v. The State*, 36 Ala. 268.

2. A known exception to the general rule excluding hearsay evidence, is, in matters of pedigree, which includes not merely relationship or its degree, but the time of birth, death or marriage.—1 Whart. Ev. § 208. This evidence is not regarded as secondary—it is classed as primary, and though

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more satisfactory evidence of the fact could be produced, the evidence must go to the jury affected, so far as under the particular circumstances of the case they may regard its credibility as affected, by the fact that the more satisfactory evidence is not produced.—*Clements v. Hunt*, 1 Jones' Law, 400; *Patton v. Rambo*, 20 Ala. 485. The Circuit Court did not err in permitting the witness Foreman to testify as to his age, nor in refusing the first and second charges requested by the appellant.

3. There was no evidence so far as is shown by the bill of exceptions, that the appellant in good faith believed Foreman was of age when the liquor was sold. The third instruction requested, was therefore properly refused. A charge based on a hypothesis, there is no evidence tending to support, is properly refused.

4. The statute under which the present indictment was found, reads: "Any person, whether with or without a license, who shall sell or give away spirituous, vinous, or malt liquors, in any quantity whatever, to minors or persons of known intemperate habits, except upon the requisition of a physician for medicinal purposes, is guilty of a misdemeanor," &c.—Code of 1876, § 4205. For a long time the statute book has borne prohibitory enactments against the sale of liquors to minors, and these enactments have been in various forms and terms, all having the common purpose of protecting the young and inexperienced against the evils of indulgence in the use of intoxicating beverages. The statute immediately preceding the present, authorized (or rather did not fix upon it the quality of a criminal offense), a sale, or gift, with the consent of the parent, guardian, master, or other person having legal charge of the minor.—R. C. § 3619. Thus leaving it to the discretion of the person having by nature, or by law, the care of the minor, whether sales or gifts of liquor should be made to him. Under the present statute, there is but one event in which a gift or sale can be made, and that is *upon the requisition of a physician for medicinal purposes*. The authority of a parent, guardian, or master, may extend to and legalize other transactions with a minor, but it can not relieve of criminality, a sale or gift to him, of spirituous, vinous, or malt liquors, unless it is accompanied with *the requisition of a physician for medicinal purposes*.—*Simon v. State*, 54 Ala. 24. Reading the present in connection with the former statutes, there is indicated a manifest legislative intent, to render all sales or gifts of spirituous, vinous or malt liquors to minors unlawful, unless there

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is the requisition of a physician for medicinal purposes—not the mere advice of the physician that liquor shall be used, communicated to the vendor through the minor to whom it is given or sold—but an application, or a request, communicated by the physician directly to the seller, either orally or in writing. The statute must be construed in view of the mischiefs against which it is intended to provide; and while cases not within its letter, though within the mischiefs, may not be drawn under its operation, there must not be a construction, which will withdraw cases within the legitimate meaning of the language and within the mischief. The language is broad, embracing every gift or sale to a minor, with but one exception. If he is the active agent as donee or purchaser, the sale or gift is to him in fact, and it is within the words of the statute. The principal may employ him as the instrument through which he will derive benefit from the gift or sale. But such sale or gift is to the minor, and he is subjected to the temptation and danger against which the statute intends to guard him, though he is not intended to derive benefit from it. The statute would soon become a dead letter, if it was so construed that sales to the minor as agent or servant, were excluded from its operation. The legislature were idly employed when revising former statutes, and excluding sales with the consent of parent, guardian, or master, if a sale or gift to the minor as their agent is not now excluded. The agency may be created with the same facility with which the consent could be expressed. An honest error as to the existence of a fact may be an excuse for an act which would otherwise be criminal. The rule has been applied to this statute, and we have held the seller not guilty, if in the exercise of due care he is really deceived into the belief that the person to whom he sells is of full age, though the fact may be otherwise—*Pause v. State*, 55 Ala. 16. The same rule must be applied as to the fact of agency, if a sale to the minor as agent is excepted from the operation of the statute. The consequences of that construction can be easily foreseen—the statute would fall far short of accomplishing the legislative intention. We think the statute visits with punishment every sale to a minor unless it falls within the exception expressed. It must operate alike as to minors, and persons of intemperate habits, and it would scarcely be insisted that sales to such persons for themselves only, and not sales in which they may act as agents or servants, are within the statute.

5. “The law presumes that every person intends to do

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that which he does." Hence, whenever one does an act in itself legally wrong, the law presumes the intent to do that act; and the act of itself is evidence of the illegal intent. *Stein v. The State*, 37 Ala. 133. If the appellant sold or gave spirituous, or vinous, or malt liquor, to the person named in the indictment, and he was at the time a minor, without the requisition of a physician for medicinal purposes, the sale or gift was in violation of the statute, and is of itself evidence of the illegal intent. No other intent is necessary than to make the sale, or gift, and that intention existing, of which the gift or sale is evidence, there can be no inquiry as to whether he had, as it is expressed in the instructions requested, a *specific intent* to violate the law.

For the error we have noticed, the judgment is reversed and the cause remanded. The appellant must remain in custody until discharged by due course of law.

Winston v. Browning.

Bill in Equity to enforce Vendor's Lien.

1. *Abatement of purchase-money of land ; when may be claimed.*—Where by the terms of a contract of sale of lands, the price is fixed or regulated by the quantity, and there is a material mistake as to the real quantity, the vendee is entitled to compensation for the deficiency; or when sued for the purchase-money, may claim compensation by way of abatement from it.

2. *Same ; when can not be claimed.*—Where, however, the contract is not for the sale of a specific quantity of land, but for the sale of a particular tract, or designated lot or parcel, by name or description, for a sum in gross, and the transaction is *bona fide*, a mutual mistake as to *quantity*, but not as to boundaries, will not entitle the purchaser to compensation, and is not ground for rescission.

3. *Written contract, how can not be varied.*—The writings by which such a contract is evidenced, in the absence of fraud or mistake in their execution, or any subsequent modification of the contract, are its sole expositors, and can no more be varied, contradicted, or explained by parol, in equity than at law.

4. *Execution on decree in chancery ; when erroneous.*—A decree in a foreclosure suit, or bill to enforce a vendor's lien, ascertaining the amount of indebtedness, has the force and effect of a judgment; but execution can not issue until after sale and confirmation and decree ascertaining the balance due.

APPEAL from Chancery Court of Sumter.

Heard before JAMES COBBS, Esq., special chancellor.

The opinion states the case.

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THOS. B. WETMORE, for appellant.

COOKE & LITTLE, and WATTS & SONS, *contra*.

BRICKELL, C. J.—The facts of the case as shown by the record, are, that on the 18th day of January, 1873, Anthony W. Dillard bargained and sold to the appellant James M. Winston, a tract of land situate in Sumter county, known as the “Lacy Place,” with a gin stand on the place, for the sum of six thousand five hundred dollars, three thousand dollars payable in cash, and for the remainder, a credit until the first of January, 1874, was given. The land was subject to a mortgage executed by one Herndon, the vendor of Dillard. The note of Winston for the part of the purchase-money not paid in cash, it was agreed, was to be transferred to the mortgagee, so that on its payment, the lands would be freed from the encumbrance of the mortgage. The mortgage debt was due to the appellee Browning, and the note of Winston for the unpaid purchase-money, immediately on its execution, in the presence of Winston, was by Dillard, indorsed in blank, and delivered to the attorney of the appellee, and its application to the payment of the mortgage debt directed and promised. Dillard gave Winston his covenant, reciting that for the sum of six thousand five hundred dollars, he had sold him “my Elisha Lacy tract of land in Sumter county, containing 1060 acres more or less. And I agree and covenant with said James M. Winston, that I am seized of a fee simple title in and to said lands, and will make him a fee simple conveyance, free from all incumbrances of dower or otherwise to said Lacy tract, the numbers not now being at hand.” On the 9th February, 1874, Dillard executed a deed to Winston, describing the lands as “the tract of land lying and being in Sumter county and State of Alabama, and known as the Elisha Lacy tract, consisting of one thousand and sixty acres more or less according to the last will and testament of said Elisha Lacy, and more particularly described as follows:” giving the numbers thereof according to the survey by the government, and from these numbers, the quantity of land was nine hundred and twenty-three acres. The lands are described in the will of Elisha Lacy, which was executed in 1860, and admitted to probate in 1862, as *containing about one thousand and sixty acres*. The conveyance to Dillard describes them, “as the Lacy tract of land, in township twenty-one, range three west, containing about one thousand and sixty acres, be the same more or less, the same being

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that tract of land donated by Elisha Lacy, deceased, to his son Martin V. Lacy." By a survey of the lands made after the commencement of this suit, it was ascertained that the tract contained only nine hundred and twenty-three acres. Winston had known, and resided near the lands for many years before his purchase. The lands were assessed to Dillard for taxation in the years 1870, 1871, 1872, by numbers, the numbers indicating the quantity to be nine hundred and seventy-six acres, while it is stated in the assessment to be nine hundred and sixty acres. The bill is filed to enforce a lien on the lands, for the payment of the note of Winston, and the defense is a claim of an abatement from the note, for the deficiency in the quantity of the lands.

When by the terms of a contract of sale of lands, the price is fixed or regulated by the quantity, if there is a *material* mistake as to the real quantity, the vendee is entitled to compensation for the deficiency; or when sued for the purchase-money, may claim compensation by way of abatement from it. This is certainly true where the sale is of a specific quantity, or a sale by the acre, as it is usually denominated. *Minge v. Smith*, 1 Ala. 415; *Terrell v. Kirksey*, 14 Ala. 209; *Young v. Craig*, 2 Bibb, 270. "The reason is," said Judge STORY, "that each party is supposed to be regulated in his bargain by the real quantity, and if there be any mistake as to the real quantity, the one has more, and the other less, than what both intended, either in land or price. In such cases, the quantity conveyed constitutes an essential ingredient in the bargain, and is not mere matter of description. Equity, therefore, will correct the mistake, and put the parties in the situation in which they would have been, if the real facts had been known to them."—*Stebbins v. Eddy*, 4 Mason, 416. We have said a *material* mistake as to the quantity, for if the difference is so slight, that it makes no difference in the value of the lands, and it is apparent, if it had been known, there would have been no difference in price, it is immaterial, furnishing no ground for compensation.—1 Story's Eq. § 195.

But if the contract is not for the sale of a specific quantity of land—if it is for the sale of a specific tract, or a designated lot, or parcel, by name or description, for a gross sum, and the transaction is *bona fide*, a mutual mistake as to the quantity, but not as to the boundaries, will not entitle the purchaser to compensation, and would not be ground for a rescission.—1 Story's Eq. § 144; *Dozier v. Duffee*, 1 Ala. 320; *Capshaw v. Fennell*, 12 Ala. 780; *Frederick v. Young-*

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blood, 19 Ala. 680; *Wright v. Wright*, 34 Ala. 194; *Stebbins v. Eddins*, 4 Mason, 414; *Mann v. Pearson*, 2 Johns. 37; *Morris v. Emmett*, 9 Paige, 168; *Smith v. Evans*, 6 Binn. 102; *Harrison v. Talbot*, 2 Dana, 258; *Noble v. Googins*, 99 Mass. 231; *Pickman v. Trinity Church*, 122 Mass. 1. If we look to the writings to determine the character of the contract between Dillard and Winston it is apparent the sale is of this latter kind—a sale, as it was called in the Roman law, *per aversionem*—“that is, for a gross sum to be paid for the whole premises, and not at a specified price by the foot or acre. In such sales the purchaser is entitled to the quantity contained within the designated boundaries of the grant, be it more or less, without reference to quantity or measure of the premises which is mentioned in the contract or conveyance.”—*Morris v. Emmett*, *supra*. These writings, there being no allegation or proof of fraud or mistake in their execution, or of any subsequent waiver or modification of the contract they import, are the sole memorial and expositor of the contract, and parol evidence is as inadmissible in equity, as at law, to vary, contradict, or explain them.—*Frederick v. Youngblood*, *supra*; *Williams v. Hathaway*, 19 Pick. 387. The authorities we have cited, and others to which reference could be made, have settled the doctrine, “that whenever it appears by definite boundaries, or by words of qualification as ‘more or less,’ or ‘by estimation,’ or the like, that the statement of the quantity of acres in the deed is mere matter of description and not of the essence of the contract, the buyer takes the risk, if there be no element of fraud.”—*Pickman v. Trinity Church*, *supra*. It is said by Chancellor KENT: “The mention of quantity of acres, after a certain description of the subject by metes and bounds, or by other specification, is but matter of description, and does not amount to any covenant, or afford any ground for the breach of any of the usual covenants, though the quantity of acres should fall short of the given amount. Whenever it appears by definite boundaries, or by words of qualification, as ‘more or less,’ or as ‘containing by estimation,’ or the like, that the statement of the quantity of acres in the deed, is mere matter of description, and not of the essence of the contract, the buyer takes the risk of the quantity, if there be no intermixture of fraud.”—4 Kent, 467.

There was no representation of quantity made by the vendor, independent of the recital in the writings, nor is there any fact shown, which indicates that it was regarded as of the essence of the contract. The vendor and vendee

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knew the lands by the designation of the *Lacy Place*, and knew its boundaries, that is, knew who were the adjoining proprietors. Each supposed that in quantity, it approximated one thousand and sixty acres, but no stipulation of quantity was made by the one, or sought by the other. A sale of the *Lacy Place*, the quantity uncertain, for a gross sum, the gin stand being included, was the contract made. Unless that contract is departed from, there can be no abatement of the purchase-money, because of the deficiency in quantity.

The decree of the chancellor is however erroneous in ordering that execution issue for the amount of the debt ascertained to be due from the appellant. In the absence of statutory provisions, a court of equity could not in a foreclosure suit—and a suit for the enforcement of a vendor's lien is analogous to a foreclosure suit—render any other decree than one barring the equity of redemption, or directing a sale of the mortgaged premises. If after a sale, there was an unpaid balance of the mortgage debt, it was recoverable only in action at law—the court could not direct that execution issue for it.—*Hunt v. Lewin*, 4 Stew. & Por. 138; *Orchard v. Hughes*, 1 Wall. 73. The statute now declares that the decree in a foreclosure suit, or on a bill to enforce a vendor's lien, ascertaining the amount of the indebtedness, shall have the force and effect of a judgment, but that execution must not issue, until after a sale, and its confirmation, and the balance due is ascertained by a decree.—Code of 1876, § 3908. The award of execution was premature, and the decree in that respect must be here corrected.

We do not deem it necessary to prolong this opinion by discussing the remaining assignments of error. We find nothing in them which would vary our conclusions. The decree of the chancellor, as corrected, will be affirmed.

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Bill in Equity to Foreclose Mortgage.

1. *Homestead exemption; what law governs.*—The right to a homestead exemption, in favor of the widow and minor children, as against a mortgage, must be determined by the laws in force at the time of its execution, and at the death of the husband.

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2. *Mortgage of homestead, in which wife does not join; how far void.*—A mortgage or other conveyance of the homestead, in which the wife does not join, is void only as to the homestead; if the instrument embraces lands of greater quantity or greater value than the homestead, as defined by the constitution and statutes, the excess in value, or of quantity, passes to the grantee.

3. *Homestead exemption of lot in city; what essential to.*—The constitution of 1868 exempted a homestead in a city, town or village, from liability to seizure on legal process, only where the lot and appurtenances did not exceed two thousand dollars in value; and the limitations as to quantity and value not existing, there was no exemption from payment of debts, and no constitutional restraint as to alienation.

4. *Same.*—If the homestead exceeded the limitation of value, and was incapable of division, so as to reduce it within the limitation, there was no authority, prior to the act of 1873, to allow an equivalent in money; and that act provides for such allowance only where the homestead is sold under legal process, during the life of the owner, or his personal representative sells after his death.

5. *Dower; how can be obtained.*—The court directs the attention of the parties to the consideration of the question, whether on bill filed against the widow and others to foreclose a mortgage executed by the husband, she can obtain dower in that suit otherwise than by cross-bill, and whether an allowance of a gross sum in lieu of dower can be made otherwise than by consent of the mortgagee.

APPEAL from Mobile Chancery Court.

Heard before Hon. H. AUSTILL.

The appellant, Helen Garner, filed her bill against the administrator, widow, and heirs-at-law of John H. Garner, to foreclose a mortgage on certain real estate in the city of Mobile, made by the deceased in his life-time.

The pleadings and proof disclose the following state of facts: John H. Garner owned a house and lot in the city of Mobile, which had been for many years the home of himself and family, and continued to be such up to the time of his death, which took place in August, 1876, since which time it has been occupied as a home by his widow and children. On the 13th day of May, 1874, he executed his promissory note for the sum of ten thousand dollars, payable to complainant twelve months after date. On the 15th of September, 1874, he executed a mortgage on the premises to secure the note, which mortgage recited that the property was his residence, and was duly acknowledged on the 10th, and admitted to record on the 14th, of October, in the same year. The widow, Mary Garner, refused to join in the mortgage, on the express ground that it was the home of the family. The property exceeded in value the sum of two thousand dollars, and was incapable of division. The estate of John H. Garner had been declared insolvent. The administrator and widow demurred to the bill, on the ground that the mortgage showed on its face that the property was

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the homestead of the husband, and that the failure of the wife to join in it, rendered it absolutely void. The demurrer was overruled. The final decree rendered, decreed that the widow and children were entitled to a homestead exemption to the extent of \$2,000, to be reserved out of the proceeds, and that the widow was also entitled to dower, which should be valued, and the amount retained from the proceeds of sale, the remainder to go in satisfaction of the mortgage debt.

The allowance of the exemption, and of dower to the widow, are now assigned as error.

HERNDON & SMITH, for appellant.—The laws in force at the time of the ancestor's death govern as to exemptions in favor of the widow and children. Subsequent legislation cannot enlarge or diminish their rights in this respect. 53 Ala. 135, 447. The right depends on these laws, whatever may be the changes by subsequent legislation, or constitutional provision.—*Miller v. Marx*, 55 Ala. 322. The laws in force at the time of the death of the husband in August, 1876, were the constitution of Alabama of 1875, article 10, sections 2, 3, 5, and the act of the General Assembly of April 23, 1873. The constitution in such a case as this confers no right of homestead on the widow.—See *Miller v. Marx*. The act of 1873 does not in its letter provide for a case like the present, nor, according to what is written, can any interpretation be made, which will embrace it. Section 11 of the act provides only for carving out an equivalent of \$2,000 for the homestead in favor of the debtor, when his homestead, exceeding two thousand dollars in value, is levied on and sold under execution against him. Section 16 provides only for the case where there is no mortgage and the homestead is sold under an order of the Probate Court to pay debts of the husband and father, and confers jurisdiction on the Probate Court to secure the exemption to the widow or children. These are the only courts and modes in which the right of exemption can be asserted under the act of 1873.—See *Rottenberry v. Pipes*, 53 Ala. 450; *Miller v. Marx*, 55 Ala. 322.

ANDERSON & BOND, *contra*.—The plain and obvious purpose of the act of 1873 was to secure to the family a homestead; and if the property exceeded two thousand dollars, to carve out that amount. That act provides that the mortgage of the homestead by the owner, if a married man, shall not be valid without the voluntary signature and assent of

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the wife, on a private examination, separate and apart from the husband. What is the homestead under the act of 1873? That homestead, whatever its extent and measure, is not affected by the mortgage, by reason of the non-consent of the wife. If the act of 1873 secured to the debtor's family the amount of two thousand dollars, where the value of the homestead exceeded that, the chancellor was bound to set apart that amount, free from the mortgage, if indeed the mortgage had any validity. We insist, then, if the mortgagee fails to secure the voluntary signature and assent of the wife, the instrument is invalid, no matter the extent or value of the homestead; and if the mortgage be a valid security, the homestead must be carved out before any sale can be made. The complainant must pay or tender the sum of two thousand dollars to the widow and minor children. In this case, the widow has persistently refused to give her assent to the mortgage, and of this the complainant had notice. It seems to us that it would be eliminating from the statute all its protective force, if the widow and family are denied, under these circumstances, the benefit of their homestead.

BRICKELL, C. J.—The constitution of 1868, operative at the execution of the mortgage, and which must determine its validity, so far as it depends upon constitutional provision, like the present constitution, declared, that no mortgage or other alienation of the homestead, by the owner thereof, if a married man, should be valid without the *voluntary signature and assent of the wife*. No particular mode of signing, or expressing the assent, was prescribed. Prior to the statute of April 23, 1873, (Pamph. Acts 1872-3, p. 64), if the wife joined in the execution of the conveyance, and it was acknowledged, or proved, and certified in the mode prescribed by the general statutes for the execution by married women of conveyances of real estate, the mandate of the constitution was satisfied.—*Miller v. Marx*, 55 Ala. 322. This statute declared no mortgage or other alienation of the homestead, by the husband, should be valid, unless the voluntary signature and assent of the wife was shown by her privy examination, certified in writing by a judge or chancellor in a particular form. Neither the constitution, nor the statute, render the mortgage, or other conveyance, absolutely void—it is void only as to the *homestead*. When it embraces lands of greater quantity, or greater value, than the homestead, as defined by the constitution, or the statute,

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the excess in value, or of quantity, passes to the grantee. *McGuire v. Van Pelt*, 55 Ala. 344; Thompson on Homestead, §§ 474, 477.

It is a *homestead*, not exceeding eighty acres in quantity, if not in a town, city or village; or if in a town, city or village, a lot with the dwelling and appurtenances, not exceeding in value two thousand dollars, which the constitution exempts from liability for the payment of debts, and disables the husband from conveying *without the voluntary signature and assent of the wife*. The limitation of value applies whether the homestead is in a town, city or village, or in the country. Quantity and value are as essential elements of the homestead, as residence in the State, and actual occupancy by the owner.—*Miller v. Marx, supra*. The act of 1873, enlarged the quantity, and removed the limitation of value, as to homesteads in the country; but wrought no change as to the homestead in the city, town or village—these were suffered to remain as defined by the constitution. The constitution exempted a homestead, as an entirety—not a part of, nor an undivided interest in a homestead. Land, not exceeding in quantity eighty acres, or a lot, with the dwelling and appurtenances, neither exceeding in value two thousand dollars, were relieved from liability for the payment of debts, and alienation thereof restrained. The quantity and value were descriptive features of the homestead, and where these did not exist, the constitution did not operate—exemption from payment of debts did not attach, nor the restraint of alienation.—*Miller v. Marx, supra*.

When the homestead—the dwelling-place, exceeded the limitation of value, and was incapable of division so as to reduce it within that limitation, the constitution furnished no authority and no mode by which an equivalent could be allowed to the owner if living, or if he was dead, to his widow, or minor children.—*Miller v. Marx, supra*. The act of 1873, provided that when the homestead was in the city, town or village, and was of greater value than two thousand dollars, a sale thereof under execution or other legal process could be had, but the purchaser could not enter until he paid or tendered to the owner two thousand dollars. Or, if the owner died, and the homestead was sold by his personal representative for the payment of debts, the purchaser was required to pay two thousand dollars of the purchase-money to the probate judge for the benefit of the widow and minor child or children. The quantity of the homestead in the country having been enlarged, and the limitation of value removed, no pro-

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vision for the allowance of an equivalent was necessary, as there was no event in which it could be sold. The provision for an allowance of an equivalent in money for the homestead, the statute limited to two cases,—the sale under execution or other process in the life-time of the owner, and a sale after his death by his personal representative. When as in the present case, there was a sale to be made under a decree of foreclosure, after the death of the husband, of a homestead not capable of being reduced by partition or division, within the constitutional limitation of value, no authority is given to any court, to order an allowance or compensation in money to the widow and minor children, for the value of the homestead. The constitution did not contemplate the conversion of the homestead into money—a change of the character of the property into other property incapable of use, as that which was exempt, and the alienation of which was restrained.

The constitution and the act of 1873, must control as to the power of the court to allow compensation for the homestead, and not the act of February 9, 1877, enacted after the death of the husband, and after the execution of the mortgage.—*Taylor v. Taylor*, 53 Ala. 135; *Rottenberry v. Pipes*, ib. 447; *Chambers v. McPhail*, 55 Ala. 367. The result is the decree of the chancellor allowing to the widow and children compensation in money for the value of the homestead is erroneous.

The right of the widow to dower is not controverted. It may be well however for the parties to consider, whether it can be obtained in the present suit, without a cross-bill; and whether otherwise than by the consent of the appellant, an allowance of a gross sum in money can be made to her in lieu of dower.

The decree is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

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Indictment for Murder.

1. *Venire; what not good ground of objection to.*—A mistake in writing out in the list served on the prisoner, the surname of one of the jurors specially summoned for the trial of a capital felony, is not ground for quashing

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the venire, or stopping the trial; such name should be discarded and another juror summoned.

2. *Challenge to juror; when right of, waived.*—After jurors have been accepted and sworn, it is too late to enter into further inquiry as to their qualifications, or to challenge any of them.

3. *Service of list of jurors on prisoner, presumption as to.*—In the absence of anything showing the contrary in the record, and of any question made in the court below, it will be presumed that the list of names of persons summoned as jurors for the trial of a capital felony, was duly served upon the prisoner as required by law.

4. *Juror, presumption as to qualification of.*—Where the name of a person was drawn, whereupon he was accepted as a juror, and the defendant, his peremptory challenges having been exhausted, did not object, it must be presumed, the record being silent on the subject, that the juror possessed proper qualifications.

5. *Expert, opinion of; when admissible.*—A physician and surgeon of "long experience with gun-shot wounds, and an expert in such matters," who saw the body of the deceased shortly after she received a wound, may give his opinion as to how it was inflicted.

6. *Same; what evidence inadmissible.*—One who had been in the late war, and "saw the range of balls in a good many gun-shot wounds, but was not a physician, or a surgeon, or an expert," can not be permitted to testify as to "how the balls range, and some of the wounds which the witness had seen."

7. *New trial.*—The Supreme Court has no power to grant a new trial.

APPEAL from Circuit Court of Colbert.

Tried before Hon. W. B. WOOD.

Charles Rash, the appellant, was convicted of the murder of his wife, and sentenced to be hanged.

The bill of exceptions states that the defendant was in jail when the list of jurors summoned for his trial was served upon him. On this list appeared the name of *John H. Lockwell*, though there was no evidence that there was any person of that name. In drawing the names from the hat, the name of *James H. Lockwell* was drawn, whereupon the defendant informed the court, that this last name did not appear on the list served upon defendant, and "objected to proceeding further with the trial;" but the objection was overruled and the defendant excepted. The court ordered the name of *John H. Lockwell* to be discarded, and that another juror be summoned and his name placed in the hat. The defendant objected to this, but his objection was overruled, and he excepted. The sheriff summoned another juror, whose name was placed in the hat, and the drawing proceeded.

"After the jury had been completed and sworn, but before any testimony was introduced, the defendant objected to proceeding further with the trial, because neither of said jurors had been examined, and ascertained to possess the qualifications of jurors in cases of this kind. Neither of them had been asked whether they were connected by con-

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sanguinity in the ninth degree, or by affinity in the fifth degree, computing according to the rules of civil law, with the prosecutor or person alleged to have been slain. And defendant offered to prove by witnesses that no such questions had been asked, and the fact that such questions had not been asked was admitted. The court overruled the defendant's objection, and he duly excepted."

When eleven jurors had been obtained, the list served on defendant was exhausted, and the court ordered the sheriff, forthwith to summon two other jurors, which was done, and their names put in the hat. "These jurors were challenged, whereupon two other persons were summoned, and their names placed in the hat. The first of these, when his name was drawn, was challenged, which exhausted the defendant's peremptory challenges. The other name was then drawn, and the juror accepted by the State, and, no objection being made by the defendant, he was sworn."

On the morning of the evening on which defendant's wife was shot, defendant asked his wife who took the eggs out of his hen's nest, and she answered that she did, as she had nothing else to eat. Defendant told her that the next time she did it, he would break her head, and becoming angry, struck her a light blow with a paddle used for cleaning dirt off his plow. Defendant said to her at the same time, that if his dog had been alive she would have laid the taking of the eggs on the dog; that he (defendant) had turned up a four-legged dog, and would turn up a two-legged dog, if any more of his eggs were taken. The defendant then went into the field to work. On the same evening, about an hour before sunset, as one Prince testified, "witness passed by defendant's cabin; that he was on his mule, and said to witness that his gears were broken and he wanted them mended. Witness told him when he returned from the well, which was about seventy yards distant, he would help defendant fix the gear; that defendant assented, and said he would wait until witness came back; that about the time witness reached the well he heard a gun fire at defendant's cabin, and witness then ran back to the cabin; that before he got there he heard defendant calling for witness' father; that when witness reached the cabin, he found deceased sitting in a chair near the door, with her head thrown back, and insensible, and defendant holding and supporting her head and crying; that he asked defendant why he shot his wife, and defendant said his wife shot herself with a gun accidentally, and stated that his wife was sitting in a chair near the door, with the gun

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standing nearer the door on her left ; that a cradle about two feet high was on her right ; that he (defendant) went in and told his wife he was going hunting ; that she objected, and seized the gun with her left hand, drew it behind her back, seized it with her right hand, and in drawing it to her, it came in contact with the cradle, fired off and shot her near the right ear."

The gun was an Enfield rifle, which was long and heavy, and there were powder stains around the wound. When the witness entered, the gun was lying several feet behind defendant, with the breech next to him.

Dr. Huston, "who was shown to be a physician and surgeon of more than forty years experience with gun-shot wounds, and an expert in such matters," testified on behalf of the State, that he examined the deceased about two hours after she was shot, and found that she had been shot in the right ear, from the effects of which she died. The shot did not follow the aperture of the ear, but passed behind, tending obliquely backwards and downward, for three-fourths to an inch, lodging at the base of the skull. "This witness, in answer to a question by the solicitor, stated that from the condition of the wound, the ear of deceased must have come in contact with a hard substance." To this question and the answer thereto the defendant objected, but his objection was overruled, and he excepted.

The defendant then introduced a witness, who was familiar with gun-shot wounds and the range of balls, who testified "that a slight contact of a ball with a substance, would often change the range of a ball, either up or down, or to one side."

The defendant then "introduced R. O. Pickett, who testified that he had been a Confederate officer in the late war, and saw the range of balls in a good many gun-shot wounds, but was not a physician, or surgeon, or an expert. The defendant then offered to prove by the witness, how the balls range, and some of the wounds he had seen." The State objected to the evidence, and the court sustained the objection, and defendant excepted. The bill of exceptions does not profess to set out all the evidence.

The judgment-entry, after reciting the arraignment, plea, &c., and the rendition of the verdict, recites that "the defendant being brought to the bar, and asked by the court if he had anything to say why sentence of the law should not be pronounced against him, according to the verdict of the jury so found, made his statement. It is thereupon considered," &c.

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It does not affirmatively appear from the record that the list of jurors summoned for defendant's trial, was served upon him one entire day before the day set for the trial; but no objection was raised on this account in the court below.

The various rulings to which exception was reserved, are now assigned as error, as also that a list of jurors summoned for the trial was not served on the prisoner one entire day, before the day set for the trial.

JAMES JACKSON, JOSEPH GILBERT, and J. B. MOORE, for appellant.—The record should show affirmatively that the list of the jury was served one entire day before the day appointed for the trial. It appears affirmatively that defendant was in actual custody.—Code, § 4872; *Johnson v. State*, 47 Ala. 30. Lewis' case, 51 Ala. 1, is not in conflict with former cases. Lewis was not shown to have been in custody. The court erred in its ruling as to the juror Stockwell.—Code, § 4872; *Johnson v. State, supra*. It was error to swear the jurors without ascertaining their qualifications. 52 Ala. 351.

The court erred in allowing Dr. Huston to answer the question of the solicitor. A medical man may prove the cause of death, the consequences of wounds; and their opinions may be given in evidence, whenever the nature of the subject-matter is such as "to call for their study, in order to qualify a man to understand it."—1 Greenl. Ev. 440. Huston's answer did not come under either head. It is the same thing as if he had been allowed to state that from the range of the ball, the breach of the gun must have been elevated and the muzzle depressed. This was the very matter which the jury had to solve. It was the vital question.—40 Cal. 272; 49 Mo. 274; 35 Iowa, 107. Pickett's testimony should have been admitted. If he was experienced in such matters, it was not necessary that he should be an expert.—13 Ala. 68; 35 Ala. 555. The twelfth juror was put upon defendant without his consent. He was not asked whether he would accept the juror. The record shows that the defendant "*made his statement*," when asked why judgment should not be pronounced. He did say something. What was it? It is not recited that this statement amounted to nothing "in bar or preclusion" of judgment. It is idle to ask the question, if the defendant can not get the benefit of it. This court should reverse, or grant some remedial process whereby what defendant did say may be passed on here.

Looking at the evidence set out in the bill of exceptions,

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it seems the *weakest evidence* that ever a human being was sentenced to death upon. His own declarations were introduced by the State. They showed the killing was accidental. He is found supporting the head of his wife and crying and calling for help.

The range of the ball, three-fourths of an inch downward, without any proof whatever of the position of deceased's head at the time the gun fired, seem to have been seized on by the jury. And in the face of his conduct on the occasion, and his solemn declaration made at the time, establishing his innocence, this man is condemned to death. Has all reasonable doubt been excluded? Are the facts and circumstances of a conclusive tendency? If upon this evidence, all of which is set out in the bill of exceptions, any one of the fundamental rules of circumstantial evidence has been violated, would it not be the duty of this court to reverse the judgment?

H. C. TOMPKINS, Attorney-General, *contra*.

STONE, J.—1. The rulings of the Circuit Court, in reference to the juror Lockwell, were in precise accordance with the statute, Code of 1876, § 4876, as construed in *Floyd v. The State*, 55 Ala. 61, and are free from error. Neither did the court err in refusing, after the jurors had been accepted and sworn, to allow further inquiry, or challenge of jurors. Questions as to the qualification of jurors, not previously raised, must be treated as waived, when the jurors for the trial of a felony are accepted and sworn.—*Smith v. The State*, 55 Ala. 1. It should be observed, however, that in this case, no offer appears to have been made in the court below, to show that any of the jurors were related, by consanguinity or affinity, to the deceased or the accused.—See *Drake v. The State*, 51 Ala. 30.

2. The judgment-entry fails to show that a list of the jurors, summoned for defendant's trial, was served on him one entire day before the trial. If necessary, we would presume this was done, in the absence of objection in the court below that it was not done, or other statement of the record, rebutting the presumption.—*Paris v. The State*, 36 Ala. 232; *Lewis v. The State*, 51 Ala. 1.

But the bill of exceptions in this case, made part of the record, shows that a list of the jurors was so served. The cases of *Robertson v. The State*, 43 Ala. 80; *Flanagan v. The State*, 46 Ala. 703; *Bugg v. The State*, 47 Ala. 50, and *Mor-*

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gan v. The State, 48 Ala. 65, have been heretofore overruled. *Lewis v. The State*, *supra*.

3. There is nothing in the objection that the twelfth juror was put on defendant without his consent. He had exhausted his peremptory challenges, and could not challenge further, except for cause. The silence of the record must be regarded as evidence that no legal reason existed why the juror should not be received as a juror for the trial of the case.

4. The Circuit Court pursued the law in its rulings on the testimony of experts.—*Tullis v. Kidd*, 12 Ala. 648; *Bush v. Jackson*, 24 Ala. 273; *Bennett v. Fail*, 26 Ala. 605; *Johnson v. The State*, 35 Ala. 370.

5. We are asked to reverse this case, because it is said the whole evidence is before us, and that it did not justify the conviction. We need scarcely say, what has been many times said, that under our system, this court has no power to grant a new trial. Such applications are addressed to the enlightened discretion of the primary court trying the cause. If that court refuse a new trial, and if the record show no reversible error in the court's rulings, there is no redress, save in the pardoning or commuting power of the executive, if the case be one to call for it. We express no opinion on the testimony found in this record. But the record does not show or affirm that it contains all the evidence.

The judgment of the Circuit Court is affirmed, and it is ordered and adjudged that on Friday, the 28th day of March, 1879, the sentence of the law pronounced in this cause be executed, by hanging the said Charles Rash by the neck until he is dead; and the sheriff of Colbert county is charged with the execution of this sentence.

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Petition to quash Execution issued by Register, &c.

1. *Costs, execution for, against obligors on injunction bond; when register may issue.*—Under our statutes, in all cases where an injunction has been obtained, and costs decreed against the complainant on its dissolution, the register may, without a reference or further order of the court, issue execution for costs, against any or all of the parties to the injunction bond.

APPEAL from Colbert Chancery Court.
Heard before Hon. H. C. SPEAKE.

[Newsom v. Thoraton, Adm'r.]

The appellee, as administrator of Eliza Johnson, deceased, commenced proceedings in the Court of Probate of Franklin county, against W. R. Newsom, as executor of Whitmell Rutland, deceased, for the recovery of a legacy bequeathed his intestate. Thereupon Newsom filed a bill in equity, praying that the proceedings be enjoined, and obtained a temporary injunction, giving bond with the appellant and others as sureties, payable and with condition as prescribed by the statute.—Code of 1876, § 3871. The bill was dismissed, the injunction dissolved, and costs decreed against the complainant. The register issued an execution against all the obligors on the injunction bond for the costs incurred in the Court of Chancery, and the appellant filed a petition to the chancellor, praying that the execution be superseded and quashed, as having been issued without authority of law. On a hearing, the chancellor dismissed the petition, and the decree of dismissal is now assigned as error.

J. B. MOORE, for appellant.

L. B. THORNTON, *contra*.

BRICKELL, C. J.—It is said that “independent of statutory enactments, a court of equity has the power upon the dissolution of an injunction to ascertain, by reference to a master or otherwise, the amount of damages caused to defendant by the injunction, and to decree payment of this amount.” High on Inj. § 962. However this may be, there was no reference to the register to ascertain damages, and no decree rendered for them. The authority of the register to issue the execution must therefore, if it exists, be derived from statute. The statutes require, whenever a temporary injunction is granted, that before the writ issues, the party obtaining the order must give bond with security for the protection of the parties enjoined, and which will indemnify them, in the event of a dissolution of the injunction. Where the injunction is to restrain the execution of a judgment at law, in a personal action, the penalty of the bond is double the amount of the judgment, and its condition is, in the event of dissolution, to pay the amount of the judgment, with interest, and also such costs and damages as may be decreed against the party obtaining the injunction.—Code of 1876, § 3869. If the purpose is to stay proceedings after judgment at law, in an action for the recovery of lands, the officer, granting the writ, prescribes the penalty of the bond,

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and its condition is: "the payment of the damages in such judgment, . . . and also all damages and costs which the plaintiff, in such judgment sustains, by the suing out such injunction, if the same is dissolved."—Ib. § 3870. In all other cases, the officer granting the order for the injunction, prescribes the penalty of the bond, and its condition is: "to pay all damages which any person may sustain, by the suing out of such injunction, if the same is dissolved."—Ib. § 3871. The bond when given to enjoin proceedings at law on a judgment for money, upon dissolution has the force and effect of a judgment; and being certified by the register to the clerk of the court in which the judgment was rendered, he can issue execution thereon against any or all the obligors, for the amount of the judgment, the interest, and the damages if any are decreed, the chancellor having power to decree six per centum damages, if of the opinion the injunction was obtained for delay.—Ib. §§ 3875-6. The succeeding section of the Code, is that from which authority to issue the execution in the present case is claimed, and it reads: "The register may also issue execution for costs, if decreed against the party obtaining the injunction, against any or all the obligors in the bond." The argument for the appellant is, that this section refers only to the bonds mentioned in the preceding section, given to enjoin proceedings on a judgment at law for money. While for the appellee, it is insisted that it refers to all injunction bonds.

The statutes prior to the Code, gave to every injunction bond the force and effect of a judgment, and an execution could issue against the obligors "for the costs incurred in and about the chancery proceedings."—Clay's Dig. 357, § 79. The chapter of the Code devoted to injunctions is in some respects a revision of former statutes which are substantially embodied in it, and in others, the introduction of new and auxiliary proceedings which while they may tend to render the remedy by injunction more advantageous, are also framed to protect parties against its abuse. We find in them no indication of a purpose to lessen the liability of obligors in bonds given for injunctions, or to deprive parties of remedies on them which the former statutes afforded. If the word *also*, was omitted from the section of the Code under consideration, there would be no question of the authority of the register to issue execution for the costs decreed against the party obtaining the injunction, against any or all of the parties to any injunction bond. The previous section confers on the clerk of the Circuit Court authority to issue

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execution for the amount of a moneyed judgment, interest and damages, against any of the obligors in the bond for injunction, and the purpose was to confer a like authority on the register as to costs of the Court of Chancery, in all cases. Changes of phraseology, in a revision of statutes, are not regarded as altering the law as it was settled by the plain language of former statutes, unless the intent to alter is clear. Sedgwick's Stat. and Con. Law, 229. If we deduce the intent to alter the law as it formerly existed from the phraseology of this section of the Code, the result is, that in no other case, than the injunction of a moneyed judgment, can the costs of the Chancery Court be recovered of the sureties on the bonds, without an action at law on the bond, or an ascertainment of them by a reference to the register, and a decree therefor by the chancellor, if he has the power. The policy of all our statutes is to render effectual by summary judgments, and immediate execution, all bonds taken in the course of judicial proceedings, and from this policy there would be a departure, if the construction of this section of the Code, for which the appellant insists, was adopted. We concur with the chancellor, that its fair construction, is, to authorize the register in all cases, when costs are decreed against the party obtaining an injunction, to issue an execution for their collection against any or all the parties to the bond, and such we believe is the construction it has received in practice. Let the decree be affirmed.

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Real Action in the Nature of Ejectment.

1. *Homestead exemption; what may be the subject of.*—The other conditions concurring, lands of the statutory separate estate of the wife, may be the subject of homestead exemption.

2. *Same; how may be aliened.*—A conveyance of such land in the manner requisite to convey the wife's statutory estate, will pass title thereto, freed from the right of homestead exemption, though the lands constitute the homestead, and there is no separate examination of the wife, apart from the husband, as required by the act of April 3d, 1873.

3. *Constitutional and statutory provisions with reference to alienation of the homestead; to what, apply.*—The constitutional requirements, and statutes passed to carry it into effect, as to the alienation of the homestead, apply to cases where the owner thereof is a married man, and do not affect a homestead in lands of the statutory estate of the wife, which husband and wife have conveyed in the manner requisite to pass her title to such lands.

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APPEAL from the Circuit Court of Mobile.

Tried before Hon. HENRY T. TOULMIN.

This was a real action in the nature of ejectment, brought by the appellant, Weiner, in November, 1877, against the appellee, Sterling, to recover a house and lot in Mobile. The lot in question, before appellant conveyed it, constituted part of her statutory separate estate, held under a deed made to her in October, 1872. In 1873, it was occupied by her family, consisting of her husband, herself and her three children, as their home. In December of that year she and her husband executed a deed thereof in the proper manner to convey the wife's statutory separate estate, to one Fleishman, for \$2,500; who subsequently sold and conveyed the same property to one Halen; who afterwards sold and conveyed it to a loan and building association of Mobile, that sold and conveyed it to Catherine Sterling, wife of Daniel Sterling, the defendant. After the sale, Mrs. Weiner and her family removed from the premises, and went to Troy, Pike county, Alabama, where they resided three or four years.

When the defendant offered in evidence the deed of appellant and her husband, conveying the premises to Fleishman, she objected, on the ground that it showed that there had been no examination of the wife, separate and apart from the husband, as required by the act of April 23d, 1873, wherefore the deed was ineffectual to pass the title, the lands being at the date of the deed the homestead of the family. The court overruled this objection, and admitted the deed, against the objection and exception of the appellant, in consequence of which she was forced to take a non-suit, &c. This ruling is the principal error assigned.

HANNIS TAYLOR, for appellant.—The deed to Fleishman should have been excluded. It showed on its face that the statute of April 23d, 1873, with reference to the alienation of homesteads, had not been complied with. There was no examination of the wife, separate and apart from the husband. To avoid this objection, it is urged that the husband is not the "owner" of the lands, within the meaning of the constitution and statutes. Or, in other words, that because the legal title was in the wife and the land her separate estate, that the husband was not owner in the meaning of the act, and therefore no separate examination of the wife was necessary. Under the statutes of this State, is the husband of a married woman, owning a statutory separate estate, in virtue of his marital rights, an owner of the estate within the meaning of the homestead law?

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“The husband by marriage acquires the right to the use and occupation of his wife’s land, during the coverture, whether her title *is or not* governed by the statute creating and defining the separate estates of married women.”—*Bishop v. Blair*, 36 Ala. 80; Brick. Dig. 11 vol. p. 71. At the death of the wife, whether the estate be by statute or contract, the husband has an estate for life. So, in this State, the practical result of the authorities, is this, that whatever may be the character of the wife’s estate in land, the husband is tenant for life; subject, it is true, in certain contingencies, to be divested of his estate.

It is well settled, both upon principle and authority, that this estate of the husband makes him an “owner” within the meaning of the homestead law.

In *Webber v. Short*, 55 Ala. 318, Justice MANNING said, “constitutional and statutory provisions conferring exemptions will be liberally interpreted to effectuate the spirit and policy of the law-givers,” &c. It was decided in this case that it was not necessary for the husband to be seized in fee in order to vest the homestead right. “No matter by *what tenure* he held, the right of homestead exemption, except as against persons having, a paramount title, will exist during the continuance of his estate, whether it be *an equitable estate, or an estate for life, for a term of years or a less estate.*” This case, which settles the question, defines the principle contemplated by the constitution. To keep the family in *possession* of the homestead is the object of the law; therefore, the legal title is ignored, and the *possessory estate* made the test of ownership. For all the purposes of the act, the husband is the possessor, and it is his possession that keeps the family in possession—and it is this ownership, which the law intends to protect. And this is the universal rule. In the treatise of Smyth on “The Law of Homestead and Exemption,” section 114, the principle that “the homestead right does not depend upon the *character of the title* held by the party claiming it,” is stated as the general rule, recognized everywhere. This precise question has been decided in Illinois, where it was held, that the homestead right attached to lands of which the wife is owner in fee, the husband having only an estate as tenant by the courtesy.—Smyth on Homestead, &c., section 107; *Boyd v. Cuddeback*, 31 Ill. 113; *Tourville v. Pierson*, 39 Ill. 446. If it is the policy of the law to protect the homestead, when the title is in the husband; *a fortiori*, when it is in the wife,—who is always the

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object of its special solicitude,—the rule should be strictly enforced.

If the husband then be the owner, within the meaning of the act, the deed was void absolutely, and the title and right of action remained unchanged.

STEPHENS CROOM, *contra*.—1. The wife's statutory estate can not be the subject of homestead exemption. The policy of our exemption laws contemplates, throughout, only the property of the family—the husband. It is solicitous to preserve from his creditors a sufficiency of *his* property to keep his family from want, both in his life-time and after his death. But the wife's separate estate has been strictly distinguished from that of the husband. It is not liable for his debts, and therefore it is not necessary to protect it from his creditors by exemption. No allusion to or provision concerning the separate estate of the wife is anywhere to be found in our exemption laws. She is given a controlling influence in his exemptions—but these exemptions have nothing to do with her separate property.

The question does not appear to have been raised in this State; but in other States, having similar laws, both in respect to the wife's property and the family homestead, it has been decided that the wife's separate property can not be the subject of homestead within the meaning of the exemption laws. *Davis v. Dodds*, 20 Ohio St. 173; *Holman v. Martin*, 12 Ind. 553; *Revalk v. Kramer*, 8 Cal. 71, 72.

The constitution of 1868 provided that “no mortgage or other alienation of the homestead by the *owner* thereof, *if a married man*, shall be valid without the voluntary signature and assent of the wife.” The exemption act of 1873 uses the same language, superadding that the wife must be separately examined touching her assent, which must be certified to.

These provisions are plainly in derogation of the common law and former statute law in regard to the transfer of title to real property. They must be strictly construed. The “terms and language employed” (see *Webber v Short*, 1st head note) confine them to the sale of a homestead which a married *man* is the owner. Here the owner is a married *woman*—who may alien her statutory separate estate by deed with her husband acknowledged in the ordinary way, as was done in this instance.—*Weil v. Pope*, 53 Ala.

The appellant claims for the phraseology under consideration a “liberal construction” which would make it applicable to a homestead owned by a married woman equally with

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that of a married man—by analogy. The reasoning, if carried out, would require a separate examination of the husband touching his assent,—and compulsion by his wife!

The statute does not direct a liberal construction. And in the State of New York it is held that statutes exempting portions of a debtor's property are in derogation of the common law, and to be strictly construed.—*Rue v. Alter*, 5 Denio, 119. Our rule is, that constitutions will be liberally construed to effectuate the spirit and policy of the law, but in doing so the court can not create rights by construction, or ignore limitations or restrictions plainly growing out of the terms and language employed.

MANNING, J.—The contention on appellant's part is, that the property in question was her homestead when her deed of it was made; that she was not examined according to the act of April 23d, 1873, separate and apart from her husband, when she acknowledged the execution of it; and that, therefore the deed is void. Defendant's counsel on the contrary, insist that the wife's separate estate "can not be the subject of homestead exemption," and next, that if it may be, still that the act of 1873 does not make Mrs. Weiner's deed void.

Upon the former of these propositions, consistency with our rulings in other cases, require us to non-concur with counsel for the defense.—*Webber v. Short*, 55 Ala. 318; *McGuire v. VanPelt*, id. 359.

We think the homestead of a family may be situated on land of the statutory separate estate of the wife. And inasmuch, as the law confers on her husband the authority to manage and control such property as trustee, and, in order to prevent interference with his management and discord in the family circle, to receive and disburse the rents, income and profits without liability to account for them,—though they are not to be, even in his hands, subject to the payment of his debts,—the homestead might properly be considered to some extent as that of the husband. Certainly it would be so regarded and as under the protection of the homestead law against his creditors, if he had in it any interest subject to execution that would enable them to expel him therefrom, by a sale of that interest.

But is it correct to say that the husband is the owner of such homestead property within the meaning of the subsequent part of the homestead law relating to sales or mortgages thereof? True the possession of the wife's statutory

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separate estate vests in him as trustee, and he is entitled to manage and control it, in order to enable him—the husband and father, and therefore trustee, without liability to account for the income, to provide therewith for the maintenance of the family. But he can not sell or mortgage the property to another. The title to it all remains in his wife; and in the event of such sale or mortgage being made by him, she, relying on her title, may sue alone, either at law or in equity, according to the case presented, to make void such alienation and recover the property back. This has been several times decided in respect to personal property,—over which it would seem the husband's power would be, rather more than less absolute, than over the realty. The wife is herself the true owner of her separate estate.

Hence, the homestead situated thereon is under the terms of the homestead law quite as properly that of the wife as of the husband. The constitution elsewhere declares that property of the separate estate of the wife “shall not be liable for any debts, obligations or engagements of her husband.”—§ 6 of art. xiv. of Const. 1868, and of art. x. of Const. of 1875. It is thus exempt from sale to pay his debts, without the aid of a homestead law. The purpose of its provisions is—to prevent the homestead from being sold at the instance of even the owner's creditors. The words of the constitution are: “Every homestead . . . owned and occupied by *any resident* of this State, [male or female, married or unmarried], shall be exempted from sale or execution or other final process of any court,—for any debt” of course of such owner. And to give effect to this provision, we must hold that it is exempt as the homestead of the wife, from the payment of her debts or contracts; and that it is not in the power of the legislature, by changing the law so as to authorize a married woman to contract debts for which her statutory separate estate shall be liable, to subject her homestead thereon, of the extent and value prescribed in the constitution, to the payment of such debts, without her consent. We have no doubt therefore that the wife's statutory separate estate may be subject to the homestead exemption.

In considering the second proposition insisted upon for the defense, we must go further. It does not depend on anything yet quoted from the constitution. The next clause therein is as follows: “Such exemption, however, shall not extend to any mortgage lawfully obtained; but such mortgage or other alienation of the homestead, by the *owner*

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thereof, if a married man, shall not be valid, without the voluntary signature and assent of the wife to the same." The statute of April 23d, 1873, under which this controversy arises, copies this language from the constitution, and then adds further, that the wife's signature and assent must be shown by an examination of her on the subject, separate and apart from her husband, had "before a Circuit or Supreme Court judge, or chancellor, or judge of probate," and duly certified by him. Such an examination was not made and certified in this instance; and the question to be decided is, whether the deed of Mrs. Weiner and her husband is, for this reason, invalid.

The transaction was "an out and out sale" for value. The property conveyed was of her statutory separate estate; and the conveyance was duly executed to alienate it as such. But the property was the seat of the homestead in which the family lived. And the constitution and the statute both say that a "mortgage or other alienation of such homestead by *the owner thereof, if a married man*," shall not be valid without her signature and assent; and the statute adds—without an examination and certificate as prescribed.

The body of laws concerning the statutory separate estates of married women, has been regarded by this court as constituting a system by itself. And subsequent legislation is not understood as intended to change it, or the rules composing it, unless that be the manifest purpose of the enactment.

In *Fisk v. Stubbs*, 30 Ala. 339, the question was whether a conveyance by husband and wife of property of the wife's statutory separate estate was valid without an acknowledgment by the wife, separate and apart from the husband, that she voluntarily executed it. The act of 1850 which established this separate estate and the provisions of which were carried into the Code of 1852, and have been continued in the subsequent Codes, said nothing about a private acknowledgment by the wife of such a conveyance. But a prior act (Clay's Dig. 155, § 27), provided that "no estate of a *feme covert*, in any lands," &c., "in this State shall pass by her deed or conveyance without a previous acknowledgment made by her on a private examination," &c. The court held that this law relating to a deed made by the wife, was "not applicable to conveyances of the wife's separate estate by husband and wife," made under the act of 1850; and that this latter act "makes no distinction as to the mode of acknowledgment by the husband and wife, and it would be

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most unreasonable to say that the husband must be privately examined," &c. And in *Weil v. Pope*, 53 Ala. 588, it was held that an enactment of 1858, which was carried into the Revised Code of 1867, as section 1552, qualified the older section 2373, of the same Code, concerning the mode of conveying the property of such separate estate, only because section 1552, "so obviously by the language used, as well as by the fact that it would otherwise be wholly inoperative," made such a construction necessary.

In view of the language of the constitution, and statute of 1873, we think it the better opinion that the words, "such mortgage or other alienation of the homestead by *the owner thereof, if a married man*," &c., do not embrace a conveyance by a married woman and her husband of land of her statutory separate estate, although it be proved that their homestead was upon it.

Our legislators probably considered that a husband would be more wilful in carrying out a wish to mortgage or sell land of his own, though his homestead should be on it, and that his wife would be less resolved in her opposition to his doing so,—than either would be in regard to the alienation of land which belonged to her, especially if it embraced her homestead. And it may therefore have been thought sufficient to be assured of her assent, by a private interrogation, only when the homestead was situated on property, the title to which was not vested in her. Certainly the owner of the property was not, in this instance, "a married man." In the language used in *Webber v. Short*, 55 Ala. 316, we should "stretch words and expressions beyond their proper meaning," and "disregard limitations that are written on the face of the constitution," if we extended the operation of this clause of the homestead law so as to make it annul the deed of Mrs. Weiner and her husband.

Let the judgment in the Circuit Court be affirmed.

Collier and Wife v. Falk et al.

Appeal from Order dissolving Injunction.

1. *Bill to enjoin collection of judgment; who, not proper party to.*—The sheriff should not be made a defendant to a bill to enjoin the collection of a judgment at law, when his only connection with or interest in the case arises out of the discharge of his duties, as executive officer of the court, in the

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collection of the execution; the injunction, upon the sheriff's being notified of it, binds him as completely as if he were a party.

2. *Injunction; when properly dissolved.*—A temporary injunction, granted on the allegations of the bill, without notice to the parties adversely interested, is properly dissolved on the denials in the answer of a sole material defendant, fully and positively denying all the allegations, upon which the equity of the bill is rested, unless the facts be such that the court can find therein some good and substantial reason for retaining the injunction.

APPEAL from Chancery Court of Morgan.

Heard before Hon. H. C. SPEAKE.

This is an appeal from an order of the chancellor dissolving an injunction, granted on bill filed by Collier and his wife, against the appellee Falk, and Wiggins, the sheriff, to restrain the collection of a judgment in favor of Falk against Collier and his wife, an execution on which was then in the sheriff's hands.

The bill alleges, in substance, that complainants had had various dealings with the defendant Falk, who claimed a considerable sum of money of them. There was dispute as to the amount, and Falk brought suit in the Circuit Court against complainants, seeking to subject the statutory estate of the wife in payment of his demand. It was agreed in writing to arbitrate the matter, and the parties selected three arbitrators, who heard the parties, examined witnesses, and made an award in favor of Falk. The bill avers that Falk promised to dismiss the suit and pay the costs, as one of the inducements to arbitration, but failed to do so; and after the award was rendered, took judgment for the amount, without the knowledge of complainants, who supposed the suit had been dismissed; though the bill avers that complainants before the arbitration employed counsel, who appeared for them in the suit. The judgment-entry is made an exhibit to the bill. It states, "this day came the parties by attorneys, and defendants saying nothing in bar or preclusion of plaintiff's demand, but the amount of damages being unknown, thereupon came a jury," &c. Then follows the assessment of damages by the jury, and a judgment for the amount, &c. This judgment-entry recites nothing about the award, and on its face is a simple judgment *nil dicit*.

The bill assails the award as grossly incorrect and unjust, charges misconduct and fraud upon one of the arbitrators, which deceived the other two, and alleged that complainants were inveigled into the arbitration by the chicanery and fraud of Falk, and the person afterwards selected by him as arbitrator, and that this person, though the fact was then unknown to them, was in the employment of Falk. The

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circumstances connected with the award, and the facts as to the fraud and misconduct of Falk and the arbitrator selected by him, are set out minutely and at length in a bill containing twenty-seven paragraphs, and it is alleged that the bill was filed as soon as these facts became known.

Falk filed a lengthy sworn answer, denying in detail, fully and flatly, the various allegations upon which the equity of the bill was made to rest; asserted the fairness and correctness of the award, and denied all fraud or misconduct on the part of himself or the arbitrator whom he selected. A bare synopsis of the allegations of the bill and denials of the answer, would unduly lengthen the report of the case, and as questions of fact only are involved, it would serve no useful purpose to give them in full.

The chancellor, on motion in vacation, dissolved the injunction upon the denials in the answer; and this decree is now assigned as error.

HUMES & GORDON, for appellant.

CLARK & HARRIS, *contra*.

BRICKELL, C. J.—Wiggins, the sheriff, having the executions issued on the judgments at law, and bound to levy them according to their mandate, was improperly made a party defendant to the bill. He is without interest in the controversy, has no right involved in it, and no other connection with it, than that into which his duty as executive officer of the court compels him. There is a manifest impropriety in drawing him into the litigation between the plaintiff and the defendants in the judgments and executions, when he is simply in the discharge of his official duty, and has no right or interest involved. The writ of injunction restraining the enforcement of the judgment, is as effectual, when directed to the plaintiffs in the judgment, as it would be if directed to him and the sheriff; and obedience to it, the sheriff must yield, when notified of it, as fully as if he were a party to the suit.—*Smith v. Rogers*, 1 Stew. & Port. 317; *Shroder v. Walker*, 8 Ala. 244.

Falk is the only material defendant, within whose knowledge every fact that can give the bill equity, (if any it has) rests, and whose rights and interests alone are involved. We have carefully scrutinized the bill and answer, and there is not a fact alleged in the one, which could by possibility invest a court of equity with jurisdiction to arrest the execu-

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tion of a judgment at law, not fully and emphatically denied by the other. The principle is too firmly settled, for any special discussion of it, that when a temporary injunction is granted simply on the allegations of the bill, without notice to the parties adversely interested, and the answer of the material defendant within whose knowledge the facts constituting the equity of the bill must lie, fully and positively denies them, the injunction must on motion be dissolved, unless the court can find in the whole case, some good, substantial reason, for retaining it.—1 Brick. Dig. 677, §§ 548–549. There is no fact shown which would have justified the chancellor in retaining the injunction, and he did not err in decreeing its dissolution. Let the decree be affirmed.

Chapman *et al.* v. Abrahams, and Abrahams v. Chapman *et al.*

Bill in Equity to assert Vendor's Lien and to Foreclose Mortgage.

1. *Vendor's lien, resulting trust what does not create.*—One who advances money to the vendee to pay the deferred payment on a purchase of lands, or pays the amount, at the vendee's request, to the vendor who conveys to the purchaser, has no vendor's lien on, or resulting trust in the lands.

2. *Mortgage of statutory estate of wife, how far void; when husband by joining in, will convey his life-estate on wife's death intestate.*—Where the wife, with the husband's concurrence, purchases and partly pays for land, and they procure a third person to advance the amount of the deferred payment, which is paid by the wife to the vendor, who conveys to her in terms creating a statutory estate, husband and wife promising at the time to execute a mortgage on such lands to secure the lender, and they afterwards execute a note and mortgage pursuant to the agreement, the instrument containing the statutory words "grant, bargain and sell," and also covenants to "warrant and defend the title" against the "lawful claims of all persons,"—such mortgage is void as to the wife, and can not prejudice her or her heirs; but its covenants estop the husband from denying its validity; and upon the wife's death intestate, the husband surviving, the mortgage will have the effect to pass his life-estate.

BRICKELL, C. J. (*dissenting*), held that the mortgage was a valid security against the wife's interest in the lands.

APPEALS from Chancery Court of Marengo.

The record does not show who presided on the hearing.

These are cross appeals from a decree of the chancellor upon the demurrers to a bill filed by Mrs. Annie Abrahams, against Samuel E. Chapman, J. J. McCorkle, as administrator of Martha, the deceased wife of said Samuel, R. H. Lock-

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hart, and the heirs of said Martha. The original bill was amended, in certain particulars, which need not be specially noticed, and alleged in substance the following state of facts: On the 13th day of November, 1869, said Martha, the wife of Samuel Chapman, with the consent of her husband, purchased the tract of land in controversy, paying one-half of the price in cash, the payment of the remainder being postponed. Being unable to meet the deferred payment, they "appealed to Lockhart to make said payment for said Martha, it being understood and agreed between said Samuel, and his wife and said Lockhart, if said Lockhart would make the last payment to Clarke, the vendor, that said Martha would execute a mortgage on the lands to said Lockhart for the money so advanced by him. It was further agreed between said parties that they would get Clarke, the vendor, to draw the mortgage, and said Martha would execute it at the time she paid the balance due on the lands. Lockhart advanced the money with which to make the last payment, but it not being convenient to execute the mortgage then, the matter was deferred to a future day." Upon making this payment the vendor Clarke executed and delivered a deed to said Martha. This deed is made an exhibit, and its terms show it created in her a statutory estate. On the 24th day of May, 1871, pursuant to the understanding and agreement with Lockhart, said Martha and Samuel, her husband, executed their note to Lockhart for the amount paid by him, and on the same day secured the same by their mortgage, duly executed and acknowledged by both of them, on the lands deeded by Clarke to Martha. This mortgage is also made an exhibit. After setting forth the amount, date, &c., of the note of Martha and Samuel to Lockhart, which "they desire to secure," it states that whereas the said Martha E. is a married woman, but owns a separate estate by deed to a certain tract of land, [describing that conveyed to said Martha by Clarke] which we wished, desired and intended to convey to said Lockhart to secure the payment of said note . . . therefore the said Martha E. and Samuel Chapman do hereby give, grant, bargain, sell and convey to said Lockhart, his heirs and assigns forever, all of said lands. . . . We further say that the said debt for money advanced by said Lockhart to pay a part of the price of said lands for said Martha, and the interest thereon, and that it is now her intention to bind said lands for the payment of said sum. We covenant, to warrant and defend the title to said lands to said Lockhart, his heirs and assigns, against

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the lawful claims of all persons." The instrument contains a power of sale, and directs the surplus proceeds of sale to be paid over to said Martha, as her "separate estate."

Several partial payments were made on the note. On the 25th day of July, 1871, said Martha died intestate, leaving no estate but said lands. After her death, and after the law day of the mortgage, Lockhart transferred the note and mortgage to the complainant Abrahams, who filed this bill to foreclose the mortgage, asserting also a vendor's lien on the lands.

The administrator and heirs of Mrs. Chapman demurred to the bill, assigning, among other grounds, "2d, that it appears that complainant has no vendor's lien on the lands;" and further, that the mortgage sought to be foreclosed is void, and that it was not shown that the agreement to execute the mortgage was in writing. Samuel Chapman also demurred separately, assigning, in the same order, the same grounds as the administrator and heirs, with the additional ground that as to him complainant had an adequate remedy at law.

The chancellor made the following decree: "Demurrer heard, and it is ordered that the second ground of demurrer is well taken, and is hereby sustained, and that the other grounds of demurrer assigned are hereby overruled." Complainant, and defendants also, appealed from this decree, and by consent, assign errors upon the same record. All informality in the decree, in so far as it did not pass directly upon the demurrer, but only on the grounds of demurrer, was waived.

Mrs. Abrahams assigns as error the decree sustaining the second ground of demurrer to the bill. Samuel Chapman, and the administrator and heirs, separately assign as error, that the court overruled all the grounds of demurrer, except the second.

WATTS & SONS, and W. H. & R. E. CLARKE, for Chapman and other defendants to the bill.—1. The deed is made an exhibit, and the bill not contradicting it, it must be treated as true on demurrer.—*Minter & Gale v. Bank*, 23 Ala. 762. This deed created a statutory estate in Mrs. Chapman.

2. The mortgage to Lockhart is absolutely void as a conveyance of the wife's estate.—*Weil v. Pope*, 53 Ala. 585. There can, therefore, be no foreclosure of this mortgage, as against Mrs. Chapman's administrator and heirs.

3. There is no vendor's lien. The purchase-money was

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paid to the vendor, and he conveyed to Mrs. Chapman. Lockhart sold her nothing, and conveyed nothing to her. He merely *paid* the debt she owed for the purchase-money. 3 Ala. 168; 53 Ala. 120; 3 Johns. Chancery, 56; 6 Ala. 204.

4. Under the facts of this case, the warranty in the mortgage can not operate to convey the life-estate of Sam'l Chapman in the lands on the wife's death intestate. The deed shows on its face that the husband did not profess to own or convey any estate, but that he joined in the execution for conformity merely.—Code, § 2193. The mortgage shows that the lands attempted to be conveyed were the statutory estate of the wife, and that it was made for the sole purpose of conveying *that estate only*. The husband had at most a bare expectancy, and the recitals show that he did not assert seisin or title of any kind in himself. If a deed is void as a conveyance, the warranty is void.—Bigelow on Estoppel, 283; 3 Adolphus & Ellis, 649; 1 A. K. Marshall, 459; 8 Cowen, 543; 6 Texas, 479; 4 Porter, 141. The mortgage was not only void for want of warranty, but was absolutely prohibited by the policy and spirit of our laws. Lockhart knew all the facts, and his transferee stands in his shoes. There is no element upon which an estoppel can be worked out against Sam'l Chapman's assertion of the right to the life-estate.—5 Denio, 690.

S. H. SPROTT, and T. B. WETMORE, *contra*.—The case of *Jones v. Wilson* is conclusive against the claim of Samuel Chapman.

Under the case as made by bill, the complainant is entitled to relief on any one of three grounds: 1st, vendor's lien; 2d, resulting trust; 3d, the right of foreclosure of the mortgage.

It is believed that where the very money, for which a lien on lands is claimed on lands purchased as the statutory estate of the wife, was the very creation of that estate, at the moment it sprang into existence, equity will always hold that a lien shall rest thereon, to the extent of the amount expended in its creation in favor of the party making the payment, unless the rights of innocent purchasers or creditors intervene.—Perry on Trusts, § 126. Under the order of the Probate Court for the sale of the land, Mrs. Chapman had no separate estate till the land was paid for. This is the law of the State.—*Pylant v. Reeves*, 53 Ala. p. 134; Code of 1876, § 2468.

There was, therefore, in equity at the time, a lien in favor of Lockhart for the money so advanced by him.—*Preston &*

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Stetson v. McMillian, 58 Ala.; *Tilford v. Torrey & Lockwood*, 53 Ala. 120; *Lee v. Browder*, 51 Ala. 288; U. S. Digest, vol. 13, p. 606, § 292, under head of Trusts.

But there was at the time of the creation of this separate estate in the manner stated, an agreement made by the husband and wife, that it *should* be bound for the purchase-money to Lockhart, who created it, and this contract was such as a court of equity would enforce.—*Leach v. Noyes*, 45 N. H. 364; *Marks v. Cowles*, 53 Ala. 612.

Had the note and mortgage been executed at the time, as agreed, a court of equity would have upheld it, and it would have been considered as part and parcel of the deed of conveyance.—*Marks v. Cowles et al. supra*; *Byrne v. Marshall*, 44 Ala. 355; *Becton v. Selleck et al.* 48 Ala. 226; *Smith v. Doe, ex dem. Carson*, manuscript; *Henderson v. McBee*, 79 North Carolina, p. 219.

The mortgage not being executed at that time, the husband having concurred in the agreement, a court of equity would have enforced specific performance.—*Marks v. Cowles et al. supra*, page 503, referring to 45 N. H. 364.

The parties having done what a court of chancery would have compelled them to do, the act performed will be upheld, and will relate back to the time of agreement to perform it—which was the time of the payment of the purchase-money. 1 Jones on Mortgages, § 164; 7 Hun. (N. Y.) 1190; 1 Story Eq. Juris. § 64 g. In equity, as against Lockhart, the title did not for one moment vest in Mrs. Chapman.—1 Jones on Mortgages, § 466; *Curtis v. Root*, 20 Ill. 57. Mrs. Abrahams being transferee, has all the rights of Lockhart. The statute of frauds does not apply.—*Gafford v. Starnes*, 51 Ala. 434.

STONE, J.—The strongest view of the bill which can be taken—the one most favorable to appellant—is that Lockhart paid the money to Clark for, and at the request of Mrs. Chapman. This extinguished the debt which Mr. and Mrs. Chapman owed, and created a new debt, or legal liability to Lockhart. It was no transfer of the original demand to Lockhart. If such had been its effect, then any defense which Chapman and wife might have against Clark, could have been successfully urged against Lockhart. Paying the debt at request, Lockhart became a new creditor on a new consideration, and could not be affected by any infirmity in the original consideration. On such debt *indebitatus assumpsit* would lie in favor of Lockhart, irrespective of the char-

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acter, form, or validity of the debt he had thus extinguished. 1 Chit. Pl. 100, 350. It did not transfer the debt, or vendor's lien to Lockhart.—*Pettus v. McKinney*, 56 Ala. 41; *Foster v. Athenæum*, 3 Ala. 302; *Dennis v. Williams*, 40 Ala. 633; *Conner v. Bates*, 18 Ala. 42.

There is no resulting trust in this case.—*Tilford v. Torrey*, 53 Ala. 120; *Preston & Stetson v. McMillan*, 58 Ala. 84.

It results from the foregoing principles that the Chancery Court did not err in sustaining the second ground of demurrer. Mrs. Abrahams can take nothing by her appeal in this cause, but must pay the costs incurred therein. This disposes of the only ground of demurrer which the chancellor sustained, and of the only error assigned by her.

Appellees have also assigned errors, pursuant to their appeal and the agreement found in the record. We will first consider those assigned by the heirs-at-law, children, and personal representative of Mrs. Chapman. One ground of demurrer assigned in the court below is, that Mrs. Chapman was a married woman when she executed the note and mortgage, that the lands conveyed were her statutory separate estate, and that the note and mortgage are inoperative as to her and her property. The bill avers that the lands were the separate estate of Mrs. Chapman, purchased and conveyed to her during her coverture, and her title-deed to the property from Clark, the grantor, is made part of the bill. It bears date in February, 1871, and conveys the land to her, without any words excluding her husband's marital rights. The bill and entire record are silent as to the source from which the money was derived, with which the cash payment for the land was made, and there is no averment that, previous to the purchase of the land in controversy, Mrs. Chapman had, or had not a separate estate. These unexplained averments constitute her claim a statutory separate estate. *Short v. Battle*, 52 Ala. 456. If this were even doubtful, under the rule laid down in *Reel v. Overall*, 39 Ala. 838, we would feel bound to hold that the averments of the present bill do not show that Mrs. Chapman owned an equitable separate estate. Her estate then, for the purposes of this suit, must be treated as a statutory separate estate. Indeed, the mortgage, which the bill seeks to foreclose, declares that the lands are the separate estate of the wife. This case, then, presents the simple question of a mortgage by husband and wife of the wife's statutory separate estate, to secure a debt not incurred in the purchase of the property, but in procuring money with which to pay for property previously

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purchased. We have uniformly held that such mortgage is ineffectual to bind the statutory estate of a married woman. *Battle v. Short*, *supra*; *McDonald v. Mobile Life Ins. Co.*, manuscript; *Jones v. Wilson*, 57 Ala. 123; *O'Connor v. Chamberlain*, 59 Ala. 431.

The defendant Samuel E. Chapman, husband and co-mortgagor with Martha E. Chapman, also demurred separately to the bill, assigning the same grounds of demurrer as those assigned by the administrator of his deceased wife. She had died intestate before the present bill was filed. As we have said, the lands conveyed by the mortgage are therein described as the separate estate of Mrs. Chapman. The conveyance is by both. It contains the words "grant, bargain, sell and convey," and in addition, the following express covenant of warranty: "We covenant to warrant and defend the title to the said land to the said Lockhart, his heirs or assigns, against the lawful claims of all persons." Mrs. Chapman having died intestate, soon after the execution of the mortgage, Samuel E. Chapman, her surviving husband, succeeded to a life-estate in her lands. Does that life-estate pass by the covenants in the mortgage?

It is settled in this State that if one, having at the time no title, convey lands by warranty—even the warranty which the law implies from the employment of the words grant, bargain, sell or convey—and afterwards acquire title, such title will enure and pass *eo instanti* to his vendee. This, by a species of estoppel.—*Stewart v. Anderson*, 10 Ala. 504; *McGee v. Eustis*, 5 Stew. & Por. 426; *Kennedy v. McCartney*, 4 Por. 141; *Carter v. Doe, ex dem. Chaudron*, 21 Ala. 72, 91. In the case of *Blakeslee v. Mobile Life Insurance Co.* 57 Ala. 205, there was an equitable life estate in the wife, remainder in fee to her children. A mortgage on the lands was executed, in which husband, wife and their two children joined; one of the children adult, and the other a minor. The mortgage was made to secure a debt of the husband, and contained the words "grant, bargain and sell." The minor child, grantor, died, leaving his adult sister, co-mortgagor, his sole heir-at-law. The question was, whether this interest, which descended from the minor to his adult sister, passed by the implied covenants in her mortgage. We held that it did. Our language was, "admitting the invalidity of the mortgage by the minor, his estate having descended to his sister as sole heir, the words used in the conveyance, under the statute, imply a covenant of warranty,

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and estop her from asserting the title thus acquired against the mortgagee."

It is contended that the mortgage made by Mrs. Chapman was void, and that therefore the doctrine of estoppel does not apply. The mortgage was certainly inoperative as against Mrs. Chapman, and therefore no one could be estopped by force of the covenants she entered into. Such was the decision in *Kennedy v. McCartney, supra*. But that is not this case. While the mortgage had no effect whatever as a conveyance by Mrs. Chapman, Samuel E. Chapman was under no disability, and his covenants bind him. The case of *Wellborn v. Frisby*, 7 Jones' Law, 228, is not distinguishable from this. The opinion in that case is an able one by C. J. PEARSON. The principle of the decision will be readily comprehended from the following extract: "The deed of Wellborn and wife, as we have seen above, did not take effect as to her. Nor did it operate at the date of its execution in 1800, to pass any estate from Wellborn; for he then had no interest in the land. He was married 1794, and had issue born alive, but he did not become tenant by the *curtesy initiate* in the trust estate of his wife; for, in order to do that, there must be an actual seizin in regard to a legal estate, or something equivalent to it in regard to a trust, which was prevented by the adverse possession of Mary Gordon. So, the deed of Wellborn operated by way of estoppel, and afterwards, in 1814, when the term of five hundred years was assigned to Mrs. Wellborn, it passed to him, *jure mariti*, and then passed to the commissioners, or those claiming under them, 'to feed the estoppel,' in the quaint language of the books, and the legal effect was to vest the title in the commissioners, or those claiming under them, in the same way as if he had been the owner of the term when he executed the deed."—*Doe ex dem. v. Oliver*, 5 M. & R. 202; Smith's Leading Cases, 417, in margin; *Van Rensselaer v. Kearney*, 11 How. U. S. 297; Rawle on Cov. 405; 1 Bish. Mar. Women, § 596; Bigelow on Estoppel, 322; *Brown v. Spann*, 2 Mill. Const. Rep. 12; *Curtis v. Follett*, 15 Barb. 337; *Gill v. Fauntleroy*, 8 B. Mon. 177, 186; *Wildy v. Doe ex dem.*, 26 Miss. 35; *Beal v. Harmon*, 38 Mo. 435.

Samuel E. Chapman executed the note and mortgage conjointly with his wife, and we hold that his life estate passed by the covenants in his mortgage; and that, to that extent, the complainant is entitled to relief, according to the averments of the bill. The demurrer of Mrs. Chapman's administrator, and of her children, should have been sustained.

[Conoly v. Gayle.]

The demurrer of Samuel E. Chapman should have been overruled. Let the costs of this appeal be paid equally by appellant, Samuel E. Chapman and his sureties, and by Mrs. Abrahams.

BRICKELL, C. J., dissents on the question of the validity of the mortgage by Mrs. Chapman, holding that the same is a valid security as against her interest in the land.

Conoly v. Gayle.

Application to establish and probate lost Will.

1. *Will; what will not vitiate.*—Irrelevant recitals will not vitiate a will, and if it be duly attested by the requisite number of subscribing witnesses, the fact that another of the subscribing witnesses was incompetent to prove its execution, is entirely immaterial.

2. *Witness; competency of.*—The exception to the competency of witnesses, as declared by statute, (Code, § 3058), relates to "transactions with, or statements by a deceased person," whose estate is interested, &c., and does not disqualify a legatee or devisee, under a will propounded for probate, from testifying as to other matters connected therewith; hence when such person is offered as a witness, a general objection to his competency can not be entertained; but objection should be made to such testimony as infringes the rule declared by the statute.

3. *Lost instrument; rule as to proof of contents.*—As a general rule, where the loss of a written instrument is sought to be proved, its loss should be shown, before allowing evidence of its contents; but it rests in the sound discretion of the lower court to modify, or change, the rule in a particular case; and the exercise of that discretion is not revisable.

4. *Assignment of error; what not subject of.*—Allowing a question to be asked, which was not answered, will not support an assignment of error.

5. *Order of introducing evidence, ruling as to; what not erroneous.*—Proponent was a witness, as to the loss of the will, and contestant, on cross-examination, exhibited a copy of a bill in chancery, filed and verified by her prior to that time, which she made affidavit to, knowing it averred that decedent died intestate. By agreement of counsel, it was expressly understood that this copy was to be read in evidence, but contestant declined to do this, until proponent closed her evidence; and thereupon the court, at proponent's instance, required the copy to be read then,—*held*, not error.

6. *Evidence; what properly excluded.*—Where a part of the bill, in which complainant asserted facts to be different from what she afterwards alleged them to be, was allowed for the purpose of discrediting her testimony—other portions of the record not touching that question, and shedding no light on the issue, are irrelevant and properly excluded.

7. *Same.*—Where the record of proceedings in another court is legitimate only to show a right to appear and defend the suit, and that has already been conceded, it is not error to rule out such record.

APPEAL from Probate Court of Mobile.

Tried before Hon. PRICE WILLIAMS, Jr.

[Conoly v. Gayle.]

This was an application by Anna M. Gayle, to establish as the last will and testament of her mother, Mrs. Mary L. Gayle, what purported to be a substantial copy of a will left by her, which had been lost while in the possession of proponent. The appellant, John F. Conoly, having shown that he had become the owner, by purchase at a sale in bankruptcy, of the life-estate of Reese D. Gayle, the husband of said Mary L. Gayle, in certain lands belonging to her, was permitted to contest the probate of the alleged will. The writing which was offered for probate, as a copy of the lost will, is as follows: "I do most earnestly declare, that I did not, of my own free will and accord, sign the note held by George Craig, but made to J. D. Craig, by my husband. I did, at the earnest solicitation of my husband and J. D. Craig, who promised me if I would do it, I should never be troubled about it, as he only wanted it to save his property, and that if I did not go security on it, he would be sold out of house and home. Reese told me that he had a right to the income of my property, and if I did not sign it, he would take that and pay it, and I then consented to do it, to put bread and meat in my childrens' mouths. The note was at one time held by Ed. Woods, who came with George Craig and tried to persuade me to become principal, instead of security, and I refused. Ed. Woods then claimed the note. Now, George Craig says it belongs to him, and he intends suing me for it. I don't want a dime of my property to go to pay such debts, for I have lost enough by that family; but when I die I want my property, of all sort and description, to go to my five children, after my debts are paid. I do not want a dime taken for anything else.

"M. L. GAYLE.

"February. Witnessed by Adria Gill, Rebecca D. Gayle, Laura M. Johnson."

The court ordered a jury to determine the questions of fact, and the jury rendered a verdict to the effect that Mrs. Gayle had died testate, and that the paper offered for probate was a substantial copy of her will, and a decree was rendered accordingly.

On the trial, proponent introduced as a witness Mrs. Rebecca Johnson, formerly Rebecca Gayle, who testified that she was a daughter of Mary L. Gayle, deceased. The contestant here objected to the competency of said witness, on the ground that she was a legatee and devisee under the will sought to be established. The court overruled this objection, and contestant excepted. The proponent then asked witness

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the following question: "Do you know anything of a paper written by, or at the request of Mary L. Gayle in her lifetime, purporting to be her will?" In asking this question, as to the contents of the will, counsel stated that he would prove the loss of the original will, and that for convenience he asked to be permitted to examine this witness, as to the contents of the will, at this time, subject to the decision of the court, upon the proof of loss to be made by other witnesses. The contestant objected to the question; his objection was overruled, and he excepted. The witness then testified, that she knew of a paper written at her mother's request, and purporting to be her will; that at the time it was written, her mother was very ill, and asked Miss Laura Johnson to write it for her; that her mother signed the paper, and Miss Laura Johnson, Miss Adria Gill and herself, signed as witnesses, in the presence of her mother and at her bed-side; that this took place in Cahaba, Dallas county, Alabama, and about the month of February, 1871.

Witness was then asked by proponent, "what she considered was the state of Mrs. Maria L. Gayle's mind at that time." Contestant objected to this question, his objection was overruled, and he excepted. It is nowhere shown that this question was answered. Witness was then permitted, against the objection and exception of contestant, before the proof of loss of said paper, but upon the statement of counsel that the evidence was offered subject to proof of such loss, to state her recollection of the contents of said will as follows: "I remember my mother told Miss Laura, to write that the note she signed as security for her husband, Reese D. Gayle, to Craig, she did not want paid, as she was forced to sign it, and did not want her property to go to pay it." Witness stated that she did not recollect the exact words, and did not remember any other portion of said will.

Proponent then showed witness a letter written in pencil, and asked her if she knew who wrote the letter, and the handwriting. Contestant objected to the question, his objection was overruled, and he excepted. The witness then stated "that her mother wrote the letter to her (witness') sister, Anna M. Gayle, who was then at Selma; that it was in her mother's handwriting. Said letter was then introduced in evidence against the objection and exception of contestant. The part of said letter material to this case is the postscript, which reads as follows:

"MY DAUGHTER.—You had better come home. I had another attack of my heart last night. I am afraid I won't

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live to see Gen. Morgan, and have gotten Miss Laura to write my will, and Addie and Beckie witnessed, and don't forget to see Judge Conoly and have my name taken off Ma's bond. Gill will meet you at the boat Saturday. I am too weak to write more.

Yours affect.

"M. L. GAYLE."

"If Gen. Morgan is in Selma, tell him I want to see him. I will have him to write my will over. I don't want anything wrong in it. Miss Laura will keep this will, until I have another written.

Affect. yours,

"M. L. GAYLE."

This witness, Rebecca Johnson, on cross-examination, testified as to the circumstances of the making of the will, substantially as set out above, and in addition thereto, stated that her mother, as soon as the will was written, delivered it to Miss Laura Johnson, who, in company with witness, carried it up stairs and deposited it in her trunk, which was broken and could not be locked, and that in December, 1871, or January, 1872, Miss Laura Johnson delivered the will to Anna M. Gayle, the proponent.

Mrs. Adria Tice, formerly Miss Adria Gill, was then introduced as a witness for proponent, and testified that she was present at the making of the will—saw it written by Miss Laura Johnson, at the request of Mrs. Gayle, and saw Mrs. Gayle sign it; that it was then signed by Laura Johnson, Rebecca Gayle and witness, in the presence of Mrs. Gayle. This witness was examined as to the contents of the will, before the loss was shown, upon the statement by counsel that the evidence was offered, subject to proof of loss. To this the contestant objected, and reserved an exception. The testimony of this witness as to the contents of the will was substantially the same as that of the witness Rebecca Johnson. This witness then testified as to the writing of the letter from Mrs. Gayle to Anna M. Gayle; that the body of the letter was written by Mrs. Gayle on the morning before she wrote the will, and that the postscript was written on the next morning, and after the will had been written, and that she knew the handwriting of Mrs. Gayle, and that the letter was in her handwriting.

Proponent, Anna M. Gayle, was then introduced as a witness, and the contestant objected to her competency on the following grounds, 1st, that she was the proponent of the will; 2d, that she was not a subscribing witness to said alleged will; 3d, because she was interested in the establishment of said lost will as devisee or legatee. These objections

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were overruled by the court, and contestant excepted. She then testified that she was the daughter of Mrs. Mary L. Gayle, who died in Mobile on the 5th day of December, 1871; that four or five days after her mother's death, Miss Laura Johnson handed her the paper, purporting to be the last will of her mother; that she put this paper, together with a deed to a cemetery lot, in a purse in a trunk where she kept it all the time; that in the spring of 1873, witness went to Sardis, Miss., taking her trunk, with the purse and papers in it; that while in Sardis she spent ten or twelve days with a cousin (a "Mrs. Wright"), and that on leaving, her trunk was sent to Sardis on a wagon, with several negroes, she having preceded it; that when she received her trunk at Sardis, she discovered that it had been opened, and that she made diligent search for the missing deed and will, and could not find them; and that she had been unable to find it since. The paper purporting to be a copy of the will, and which had been offered for probate, was here shown the witness, and she was asked "to state if said paper contains a substantial copy of the paper which you have said was handed you by Laura Johnson, after your mother's death." This question was objected to, the objection overruled, and the witness permitted, against the exception of contestant, to testify "that the paper shown her was in her handwriting, and contained a substantial copy of the paper handed her by Laura Johnson, as the will of Mary L. Gayle; that she wrote the paper, about three or four weeks before the suit was commenced, and that it contains a substantial statement of her recollection of the contents of the original." She further testified, that she had made the copy for the purpose of sending it to Mobile to be filed in the Probate Court, and that she had done this at the request of her attorneys. This paper was then read to the jury, against the objection of contestant, and he excepted. On her cross-examination, the contestant, after an express agreement and understanding with the proponent, that he would introduce in evidence a certified copy of the bill in chancery at Selma, showed the witness a certified copy of a bill in chancery at Selma, Ala., with the affidavit thereto, and asked her if she did not swear to the same, and have the same filed in the Chancery Court at Selma, and if she did not know that said bill stated that Mary L. Gayle had died intestate. Witness then answered that she had the bill filed, and swore to the same, knowing it contained the statement that her mother had died intestate. Proponent then moved the court to require contestant to

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read the bill and affidavit then—to which the contestant objected, and stated to the court that they expected to introduce the bill and affidavit in evidence after the proponent had closed. The court granted the motion of proponent, and required the contestant then to read the bill and affidavit, if he intended to use the same in evidence, and he excepted. This witness was then permitted to testify, against the objection and exception of contestant, as to the reasons why she believed, when the bill was prepared, that Mrs. Gayle had died intestate. The solicitor who prepared and filed the bill in chancery, also testified as to the reason why said bill contained the averment of Mrs. Gayle's death intestate.

Proponent here rested her case. The contestant having, as before stated, read in evidence the bill and affidavit filed in the Chancery Court at Selma, without objection on the part of proponent, upon the distinct statement that his only object in offering said record, was to show the imperfection of the memory of proponent, now offered to introduce the answer of Conoly and the exhibits, and the orders and decrees made in the case. On objection of the proponent, the court excluded the record offered, and contestant excepted. Contestant also offered a transcript from the District Court of the United States, for the Middle District of Alabama, in the matter of the bankruptcy of Reese D. Gayle, and the original deed, of the assignee in bankruptcy, to the contestant, of the interest of Reese D. Gayle in the lands of Mary L. Gayle. The court, on the objection of proponent, refused to allow this evidence to be introduced, and contestant excepted. The various rulings to which exception was reserved, and the decree rendered, are now assigned as error.

BOYLES & OVERALL, and PETTUS, DAWSON & TILLMAN, for appellant.—The loss of the alleged will should have been shown, and that search had been made in every place where it was reasonable to suppose it could be found, before secondary evidence could be introduced to prove its contents; and until this was done, no secondary evidence of its contents should have been received.—2 Redfield on Wills, p. 7. The witness, Rebecca Johnson, was incompetent.—Code of 1876, § 3658. The paper alleged to be a substantial copy of the lost will was not sufficiently proven, to be evidence. The witness does not establish that the paper said to be lost was a will. Rebecca Johnson testifies to no testamentary clauses in the lost paper, and the witnesses differ materially as to what were the contents of that paper. The court erred

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in compelling the contestant to read the bill and affidavit in evidence before proponent had closed her testimony. It was competent for him on cross-examination to prove her signature, and not introduce the record until all her evidence was in.

W. R. NELSON, *contra*.—As to the jurisdiction of the Probate Court to hear and determine the application in such a case as this, see 3 Port. 51; 11 Ala. 599. When a will is lost or mislaid, whether accidentally or by design, its contents may be proved, and probate granted of the same, upon such evidence as is satisfactory to the court.—Redfield on Wills, part 2, page 6, § 6; 35 N. Y. 653; 26 N. Y. 437; *Everett v. Everett*, 41 Barb.; 39 Georgia, 168; 7 Heiskell, 598.

The paper is clearly a will. It is not requisite to the validity of the will that it should assume any particular form, or that it should be couched in language technically appropriate to its testamentary character.—52 Ala. 436; 19 Ala. 59. It clearly directs what shall be done with her property and contains no words of grant or conveyance. It is clear that section 3058 of the Code can have no application to a case like this. That statute does not extend the disability beyond *transactions with or statements by the deceased*, and a general objection as to competency was properly overruled.

The record of the chancery suit between the proponent and the other children of M. L. Gayle and Conoly could shed no light on the question at issue, and was properly excluded; so was the record in bankruptcy.

MANNING, J.—1. Though very inartificially written, the instrument proved can have effect and operation as a will, if (as the jury have found) Mrs. Gayle executed it and procured the subscribing witnesses to attest it, as her will. It is not vitiated by the irrelevant recitals in it.

2. The law of this State requires no more than two subscribing witnesses to a will, of either real or personal property, and this instrument having been attested by two persons who had no interest in Mrs. Gayle's estate, either as heir, distributee, legatee, devisee or otherwise, the fact that a third person who did stand in such relations, also signed it as a witness, can not impair its validity.

3. The instrument alleged to be the will of Mrs. Gayle, if operative as such, gives her property to all her children equally. One of these, Rebecca, was offered as a witness at the trial, and contestant "objected to the competency of this

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witness on the ground that she is . . . a legatee or devisee under the will propounded for probate, and interested in the establishment" of it, which objection was overruled. By section 3058 (2704) of the Code of 1876, it is enacted that "in other than criminal cases there must be no exclusion of any witness because he is a party, or interested in the issue tried,—except that neither party shall be allowed to testify against the other, as to any transaction with or statement by any deceased person, whose estate is interested in the result of the suit," &c. This exception does not disqualify the witness from testifying about other matters than such statements or declarations; and for this reason, the objection to her testifying at all, was properly overruled.—*O'Neal v. Reynolds*, 42 Ala. 197.

4. After giving some other testimony, this witness was asked: "Do you know anything of a paper written by or at the request of Mary L. Gayle in her life-time, purporting to be her will?" And it was stated by counsel when the question was asked, that he would prove the loss of the original will; and he asked leave for convenience sake to examine the witness now as to its contents, subject to the decision of the court, upon the proof of loss, to be made by other witnesses. Upon this statement of counsel and "for convenience in conducting the trial," (as the bill of exceptions recites), the court allowed the question to be asked. Contestant objected to the question, and excepted to the ruling of the court. The assignment of error upon this, relates not to the competency of the witness to testify, but solely to the order in which the evidence should be admitted, contestant insisting that the loss of the paper should be established, before testimony was given of its contents. A similar exception for the same reason, was subsequently taken to the testimony of Miss Adria Gill, afterwards Mrs. Tice.

In regard to the general rule on this subject, there can be no doubt. And in the cases of alleged lost wills, it should seldom be departed from. The loss of the instrument ought except in rare instances, to be proved before evidence is received of the contents. But such matters are within the control of the presiding judge. Reasons may exist which would justify him in allowing a suspension of the rule for a particular occasion; and his action in doing so, is not subject to reversal here.

5. To the question as to the condition of her mother's mind, put to the witness, Rebecca, no response appears to have been made; and no legal proposition can be raised for

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discussion here, upon an objection to an unanswered interrogatory.

6. When Anna M. Gayle, the proponent in this case, was offered as witness in it, the contestant objected to her competency to testify: 1st. Because "she was proponent of the alleged lost will." 2d. Because she was not a subscribing witness to it; and 3d. Because she was interested as devisee or legatee in the establishment of it. The objection was overruled and contestant excepted.

As we have before seen, the statute makes a party or person interested, competent to testify in their own behalf—except in relation to "statements by or transactions with the deceased," &c. The objection was not to evidence from witness, of such statements or transactions, (she gave no such evidence) but to her being a witness at all. There was no error in overruling that objection.

7. When a person dying, leaves an instrument duly executed as a will, and intended to operate as such,—and it is afterwards lost or destroyed, it is only by other evidence oral or written that proof of it can be made. Evidence of the execution and loss being made in this case, objections to the admission of the letter written by testatrix in which she speaks of having made her will and of those present when she did so, and to oral testimony of its contents, can not be sustained.

8. Upon cross-examination, proponent was shown a certified copy of a bill in chancery she had filed, and of her affidavit verifying it, and asked if she did not swear thereto knowing that the bill contained an averment that her mother, Mary L. Gayle, died intestate. She answered that she did. This copy of the bill was by "expressed agreement and understanding with proponent," to be read in evidence; but contestant's counsel declined to permit this to be done, till the case was closed on proponent's part. Thereupon the court, upon motion of the latter, required the bill to be read then; which was done accordingly, against the objection and exception of contestant. And the cross-examination being finished, proponent first, and the solicitor who wrote the bill afterwards, explained as witnesses, the reasons why they, respectively, believed, when the bill was prepared, that Mrs. Gayle had died intestate.

A defendant may, upon cross-examination, prove by his adversary's witness the signature to a document he intends afterwards to introduce, and withhold it until plaintiff's evidence is in. But in this case contestant went further. To

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his interrogatories containing the inquiries, proponent testified that she had sworn—not merely to the truth of a bill the contents of which were not made known to the jury, but that she swore to it knowing that it contained an averment, that she, whose alleged will, the witness was then endeavoring to establish, had died without leaving a will. And this answer was made upon a prior agreement that the copy of the bill should be put in evidence; so, of course, that it might be seen under what circumstances and in what terms, the averment was made. We think the court did not err in requiring the bill to be then read.

9. The object of introducing this evidence was to create in the minds of the jury distrust of the testimony of proponent. The other portions of the chancery record, composed in part of the answer of contestant, Conoly, the agreement of counsel and the decree of the court, were wholly irrelevant for that purpose, and to the issues—then to be tried by the jury—to-wit: whether Mrs. Gayle had left a will or not, and what its terms were, if she did. The introduction of all this record could only have confused the jury. There was no error in excluding such documents.

10. Nor was there any error in refusing to admit the record of the proceedings in bankruptcy against Reese D. Gayle. As purchaser of his interest in lands of Mrs. Gayle's estate, Conoly had already been permitted to intervene, as contestant, and it was only to entitle him to take this position that the record from the bankruptcy court could be of any use.

We find no error in the rulings of the judge of probate upon any point that is presented for our consideration by the exceptions and assignments of error.

Let the judgment of the Probate Court be affirmed.

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Bill to enforce Vendor's Lien.

1. *Failure or defect of title; when not available to defeat recovery of purchase-money of land.*—In the absence of fraud, mistake, or warranty, defect or failure of title in the vendor, is not available to the vendee to defeat or abate recovery for the purchase-money of lands.

2. *Same.*—B. purchased a lot, taking the agreement of R., who professed to be agent of the owner, to procure conveyance. B. endorsed on the agree-

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ment that the purchase was made for T.'s benefit, and authorized a conveyance to him. T. afterwards sold this lot, and two others to which he had title, to B., agreeing, upon payment of the deferred installment of purchase-money, "to return the original title papers," properly endorsed to B. No fraud or mistake occurred. R.'s authority was repudiated, no title could be obtained to the third lot, and B., who entered under the contract with T., was evicted. The value of the other two lots, the title to which was not disputed, did not exceed the cash payment, while the value of the third equalled the amount of the deferred payment,—*held*: T. was entitled to enforce a vendor's lien for the whole amount of the purchase-money, against the other lots.

APPEAL from Chancery Court of Sumter.

Heard before Hon. A. W. DILLARD.

Tobin, the appellant, filed his bill against T. D. Bell and R. G. McMahon, composing the firm of Bell & McMahon, to enforce a vendor's lien on certain lots in the town of Gainesville, known as "lots numbers 24, 25 and 26."

Lots Nos. 24 and 26 had belonged to said T. D. Bell, and he in 1863, as the agent of Tobin, contracted for the purchase of lot No. 25, with one Reavis, who claimed to have authority to sell, and to represent G. P. Beirne, the executor of the estate of Andrew Beirne, deceased, to whom said lot belonged. Tobin furnished the amount agreed on with Reavis, and Bell paid it over, Reavis delivering him the following written instrument:

"I have this day sold to Turner D. Bell, for the sum of twenty-five hundred dollars cash in hand paid, lot number twenty-five (25), in block eight (8); and I agree to make him, his heirs or assigns, a good title to said lot, the same being in the town of Gainesville, Alabama. Witness my hand and seal, Oct. 23, 1863.

"GEORGE P. BEIRNE, [L. S.]

"By T. REAVIS, Attorney."

Bell made thereon the following endorsement: "The within deed was for the benefit of J. W. Tobin, and I hereby authorize Judge Reavis to make a deed for the same as above. Turner D. Bell."

In January, 1866, Tobin, who had not received any deed to lot 25, though Scott, his agent, sold said lot 25, together with the other two lots which Tobin had bought of said Bell, to said Bell for the firm of Bell & McMahon, for the sum of \$3,000, one-third of which they paid in cash, executing a note for the remainder, due in twelve months. Scott delivered to them the following instrument in writing:

"GAINESVILLE, ALA., January 3, 1866.

"I, Francis S. Scott, jr., agent of John T. Tobin, have

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this day sold to Bell & McMahon lots 24, 25 and 26, in block 8, in Gainesville, conditioned as follows: Said Bell & McMahon are to pay \$1,000 in cash, and give a note at twelve months for \$2,000 in full payment for said lots; and I as agent agree to return to said parties the original title-papers endorsed by T. D. Bell to John W. Tobin, properly endorsed to said Bell & McMahon, upon payment of said note.

“JOHN W. TOBIN,
“By F. S. SCOTT.”

Bell & McMahon entered into possession of all three lots, but finally abandoned lot No. 25, because Beirne refusing to recognize Reavis' authority to sell, would not make a conveyance, but brought ejectment to recover the land. Lots 24 and 26 were not worth over \$1,000, the amount which was paid in cash, while the evidence tended to show that lot 25 was worth at least \$2,000.

Tobin brought suit in the Circuit Court and recovered judgment against McMahon for the full amount of the deferred note, though the latter attempted a defense on the ground of a failure of title to lot 25. Execution on the judgment having been returned “no property,” Tobin filed this bill.

No fraud, false representation, or deceit is charged upon Tobin, and the proof shows that Bell knew quite as much about the state of the title as Tobin did.

Upon final hearing, upon bill, answers and testimony, showing the foregoing state of facts, the chancellor dismissed the bill, and this decree is now assigned as error.

SNEDICOR & COCKRELL, for appellant.—No fraud or mistake is charged, and Bell knew all about the title.—*Steele v. Adams*, 21 Ala. 534; 24 Ala. 446; 8 Ala. 543. Besides, the judgment at law is conclusive, as to the question sought to be raised here.—*Brown v. Isbell*, 11 Ala. 509; 26 Ala. 564; *Thompson v. Christian*, 28 Ala. 399.

COOKE & LITTLE, and WATTS & SONS, *contra*.—The bill is in its nature a bill for specific performance, and he who asks a court of equity to interfere in such a case must do equity. Tobin has been fully paid for the lands to which he had title. What is due, does not exceed the value of the lot, to which he has no title. It is inequitable for him to coerce payment in full, and yet convey title to only one-third in value of the land. The parties both supposed Tobin would get a good title, and the defect or failure, was a case of mu-

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tual mistake. The attempt to make the defense at law is not conclusive in equity—the defense could not be made at law. 47 Ala. 449; 35 Ala. 259; 37 Ala. 573; *Lanier v. Hill*, 25 Ala. 554; *Scruggs v. Driver*, 31 Ala. 274.

BRICKELL, C. J.—If it was clearly shown that the appellant was without title to lot number 25, and that it was of greater value than the other lots, its value more than equalling the unpaid purchase-money, a defense to this suit would not be established. It is undisputed that the purchasers, Bell & McMahon, had full knowledge of the infirmity of the title, now alleged. Whatever of title, or of claim to title, the appellant had, was acquired by a contract of purchase made by Bell as his agent. The obligation to convey was made to him, and by indorsement thereon, he directed the conveyance to be made to the appellant. The presumption of law is, when parties contract for the sale of lands, that the purchaser intends to become the owner, and is contracting for a good title.—*Cullom v. Br. Bank Mobile*, 4 Ala. 24. And if the vendor merely stipulates for the conveyance of the lands, or for title, his contract can be performed only by the conveyance of a good title. Or if he promises simply a deed of particular description, his duty is performed by the execution of such a deed, however defective may be the title.—*Hill v. Hobart*, 16 Me. 164; *Tinney v. Ashley*, 15 Pick. 546. But a vendor in possession, however defective may be his title, may sell, and may by the contract of sale, fix the measure of his rights and responsibilities. Fraud, or mistake, not occurring, the contract is the law controlling the rights of the parties, and it is not within the province of judicial tribunals, to modify or change it, to avoid hardships which may result from it. The obligation of the vendor in the present case is on payment of the purchase-money, not to execute a conveyance of any kind—not to clothe the vendees with an indefeasible title. It is simply to *return* the title papers he had received from Bell, and which Bell had indorsed to him, and to indorse them to Bell & McMahon—in other words simply to divest himself in their favor of whatever equity Bell's indorsement had passed to him. The stipulation is not so broad as would have been an obligation to convey by quit claim deed. The contract will be fully performed, when these papers are returned indorsed by him, and his ability to perform to that extent is not questioned. Whether the vendees can thereby acquire title, is not material—they can obtain all for which

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they contracted. If they had desired to obtain more, they should have contracted for a good title. The purchaser of lands—title to which rests in writing, can claim the exhibition from his vendor of an unbroken chain of title, and protect himself against its defects, by covenants and warranty. If he takes a warranty, he has no claim either at law, or in equity against the vendor, if there is no fraud or misrepresentation, or mistake, further than the warranty extends—it is his own fault and negligence that he did not require fuller covenants. And when without covenant or warranty he buys, though he is evicted subsequently, he is without remedy. The maxim *caveat emptor* then applies, and he must abide the contract into which he has entered, with all its liabilities and consequences—*Commonwealth v. McClanahan*, 4 Rand. 482; *Abbott v. Allen*, 2 Johns. Ch. 519; *Greenleaf v. Cook*, 2 Wheat. 16; *Strong v. Waddell*, 56 Ala. 471.

The purchasers must abide by the contract they have made, and can not be relieved because of consequences they had every reason to apprehend, and against which the vendor did not bind himself to indemnify.

The decree of the chancellor must be reversed, and a decree here rendered declaring the appellant entitled to relief.

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Bill in Equity to foreclose Mortgage.

1. *Homestead ; wife's assent to alienation of ; what sufficient.*—The constitutional requirement as to the alienation of the homestead, owned by a married man, is satisfied, if the wife gives her “voluntary signature and assent” to the husband’s conveyance, though she is not named as a grantor therein, and does in terms convey anything.

2. *Same.*—Though the husband alone bargains, sells, and conveys, as grantor in a mortgage, yet if the power of sale therein proceeds from both husband and wife, and vests the mortgagee with full power to sell the lands on default of payment, &c., and the wife voluntarily signs and assents to the conveyance,—this is a compliance with the constitution, and will pass title to a homestead, owned by the husband.

3. *Material defendant, to bill for foreclosure.*—Under our laws relative to the transmission and descent of realty, and the enlarged power of the chancery court in foreclosure suits,—which are widely different from the English laws and practice,—the personal representative of a deceased mortgagor is a material defendant to a bill for foreclosure; and the omission is fatal to the decree, and will be noticed *ex mero motu* by the appellate court.

4. *Omission to make administrator a party ; what does not cure.*—When

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no reason is shown why the administrator is not made a party, the appointment of an administrator *ad litem* will not cure the defect.

APPEAL from Mobile Chancery Court.

Heard before Hon. H. AUSTILL.

This was a bill in equity filed by the appellee, Villalonga, against the widow and children of John Dooley, to foreclose a mortgage executed by deceased in his life-time on certain premises in the city of Mobile. The execution of the mortgage was duly acknowledged by Dooley and his wife, before a justice of the peace, who certified the same in the form prescribed by the Code. The terms of this instrument are set forth in the opinion. The chancellor decreed that complainant was entitled to relief, and upon the coming in of the report, ascertaining the amount of the debt, it was confirmed, and a sale of the premises decreed, &c. This decree is now assigned as error.

JOHN LITTLE SMITH, for appellant.—The deed contains no words of assent; or of release, or of conveyance by the wife. She is not a party to the conveyance at all. "A deed can not bind a party sealing it, unless it contains words expressing an intention to be bound."—3 Mason, 258; 9 Mass. 218; 4 Howard, 225; *Leavitt v. Lampsey*, 13 Pick. 382; *Lafkin v. Curtis*, 13 Mass. 223. This doctrine has been approved and followed here.—*Harrison v. Simons*, 55 Ala. 570.

2. The appellee seeks to glean an assent to the conveyance, from the power of sale at the foot of the mortgage, in which the name of the wife is recited. The power of sale in a mortgage is in the nature of a conventional remedy made by the parties to cut off the equity of redemption of the mortgagor, and is a power to sell the estate conveyed to the mortgagee without a day in court. It is a power to sell the estate conveyed. If no estate is conveyed, the power fails. It is a power appendant, annexed to and dependent upon the estate vested in the mortgagee.

"A power of sale is a power coupled with an interest, and it seems a power appendant."—11 Paige, 619, cited in note on page 101 of Hilliard on Mortgages. "These powers fall under the class of powers appendant or annexed to the estate." 4 Kent's Comm. 14. The power of sale in a mortgage is to be construed rigidly. It applies only to the remedy, and does not impair any right of the mortgagor.—2 Cowen, 195; 7 Johns. Ch. 25; 1 Hilliard on Mortgages, 90. The power only confers the authority to sell the estate conveyed to the

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mortgagee. The wife could join in the power, without consenting to the conveyance, knowing it had no field of operating, because the conveyance of her husband was of no validity to grant away the homestead.—3 Pick. 490.

3. The donee of such powers can never bring them into court for execution, or to remedy any defect in the power. When he asks the aid of a court to foreclose his mortgage, he stands upon the conveyance to him, and the power has no existence in the eyes of the court. Courts of equity view these powers to sell with great jealousy, and never lend their aid to carry them into execution. The right of homestead is claimed by the infant children of John Dooley, deceased. As they do not claim through Mrs. Dooley, nothing can be urged against them by way of estoppel. They claim the right to retain the homestead, and this right can not be defeated except by a strict compliance with the constitution.

STEWART & PILLANS, for appellee.—Aside from her dower interest, which is not involved, the widow had no estate, right or title in the mortgaged premises. They belonged to the husband, and he *conveyed*. The wife had nothing to convey. She affixed her signature, and acknowledged that she did so voluntarily. This satisfies the constitution which required, not a conveyance, but her “voluntary signature and assent.”—*Miller v. Marx*, 53 Ala. The power of sale—that which would cut off and destroy the husband’s estate—was joined in by the wife. She did so voluntarily, and her act can mean nothing less than that she assented to the conveyance. If it has not this effect, some of the most vital portions of the instrument will be rendered nugatory. All parts must have effect, if consistent with the rules of law, and not forbidden by other portions of the instrument. 10 Mod. 47; 2 Howard (U. S.) 266; 38 N. H. 29; 2 Porter, 54.

MANNING, J.—Appellants are the widow and children of John Dooley, deceased, who in 1871, made a mortgage of the property constituting his homestead, to appellee Villalonga, as a security for borrowed money. Dooley and wife both signed the instrument and acknowledged in due form of law, the execution of it by them. This suit is for foreclosure; and appellants deny that the deed is effectual against their right of homestead. The property belonged to John Dooley to whom individually it had been conveyed; and he alone according to the terms of the instrument, as grantor, bargained, sold and conveyed the land, in mortgage, to Vil-

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lalonga. But the power of sale with which the instrument concludes, begins as follows: "And the said John Dooley and Jane Dooley, his wife, do hereby vest the said Michael Villalonga, his heirs and assigns, with full power and authority, upon default in the payment of the note above described, to sell out all interest in the said above described premises," &c.

It is ingeniously contended—(first)—That Mrs. Dooley's signature does not make her a grantor of the property with her husband in the conveyance of it; and several cases are cited to support this proposition;—*Harrison v. Simons*, 55 Ala. 510; *Agricul. Bank v. Rice*, 4 How. (U. S.) 225; *Catlin v. Ware*, 9 Mass. 218; *Powell v. Monson*, 3 Mason, 348; *Leavitt v. Lampsey*, 13 Pick. 382; *Lafkin v. Curtis*, 13 Mass. 223; and, (secondly,) that the power of sale which she joined in granting, was a power appendant—annexed to the estate acquired by the mortgagee,—and could not operate beyond it on anything else, and that since she did not join her husband in conveying her homestead property, the mortgagee had no estate in it in respect of which the power to sell, could be executed.

But, to this the answer is:—The title to the property was in the husband only, and so was the right of homestead. His deed, if validly made, would convey the title; and the only ground of invalidity alleged is supposed to exist in the constitutional clause which declares that the "mortgage or other alienation of such homestead, by the owner thereof, if a married man, shall not be valid without the voluntary signature and assent of the wife thereto." It is not a conveyance by her that is required, but her "voluntary signature and assent," to the conveyance of her husband. And we think this provision is complied with, when in the body of the deed made by her husband, she voluntarily, expressly, and in conjunction with him, vests the mortgagee "his heirs and assigns with full power and authority upon default in the payment of the note . . . to sell out all the interest in the premises described,"—and adds her signature to the instrument.

There is however an omission of a material party. No reason is shown why an administrator of John Dooley's estate was not made a defendant. True, according to some of the books, that would seem not to be necessary in such a case.—Story's Eq. Pl. §§ 175, 196 and notes. This is an exception to a general rule, and was derived from a note of Mr. Cox to *Knight v. Knight*, (3 P. Wms. 333) in which the reason for the ruling, assigned by the master of rolls, is—

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"because the bill being *only to foreclose the equity*, the plaintiff need only make him a party that has the equity, (*viz:*) the heir."

It was common, in that day, to file a bill not for a sale of the mortgaged property, but for a foreclosure of the equity of redemption only, with the intent to perfect thereby the title of the mortgagee as owner, and quiet his right to the land. But in our practice this is very rare. The land is sold to pay the mortgage debt; and if after the proceeds are so used, the debt is not fully paid, the administrator is chargeable with the residue. Hence it was held in *Wilkins v. Wilkins* (4 Por. 245), that the administrator of the deceased debtor was "certainly an essential party as representing the personal estate. It would be his duty to prevent a recovery for a larger sum than was due upon the mortgage, inasmuch as the assets in his hands would be liable to pay so much as might be unsatisfied by a sale of the mortgaged property."

With this a passage in *Inge v. Boardman*, (2 Ala. 331) appears to be in conflict. But the conclusion goes beyond the premises. Construed with the facts of the case, the decision is simply this:—when it is shown that the administrator and the estate in his hands are discharged from the mortgage-debt,—as when it is barred as against them under the statute of non-claim, by failure to present it,—then it is not necessary to make the administrator a party.

Moreover, in England, real estate, whether under mortgage or not, was not liable to be subjected, as it is by our law, to administration as assets of the estate of a deceased person. If by any specialty the former owner of lands there, bound his heirs to the discharge of a debt contracted by him, the heir was directly suable at law, on account of the estate descended; in which the administrator as such, could never have any interest. But as the real estate may, by our law, and generally is brought under his administration, duties in respect to it, are cast upon him; and it is highly proper that a mortgagee filing a bill to sell lands to pay a mortgage debt, should be required to make the administrator a party, that he may see to it that property in which his interest may be greater than that of the heirs, is not unduly subjected to diminution. In Alabama, it has for many years, been the uniform practice in suits of this kind, for the mortgagee to make the administrator of the mortgagor a party, unless it be shown that he has no interest therein.

In the present case we observe, that what is called in the statute an administrator *ad litem* was appointed, in the pro-

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gress of the cause. Perhaps, if the true administrator were a party and interested adversely to the estate of the debtor, a representative *ad litem*, acting under the eye of the chancellor might have been allowable. But an administrator *ad litem* gives no bond, can not receive a dollar of the assets of the estate, has no access to the vouchers or other papers of the deceased, must be wholly uninformed in regard to his indebtedness, and in fact, be deprived both of power to be useful and of responsibility. The law will not commit the interests of the estate to a mere man of straw, when no reason is shown why a real administrator should not be made a party.

The absence from a cause of a material party to it, is a defect of which this court will *ex mero motu* take notice. *Prout v. Hoge*, 57 Ala. 28; *Goodman v. Benham*, 16 Ala. 225.

Let the decree be reversed and the cause remanded.

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Bill in Equity to annul Conveyance for Fraud as to Creditors.

1. *Conveyance, what not fraudulent, and will not amount to a general assignment.*—An absolute sale and conveyance by a father, in failing circumstances, of substantially all his property to a son, without reserving any benefit to the grantor, upon the agreement that the price, which was the fair market value of the property, should be paid by the son directly to certain of the father's creditors, whose debts equalled the price for which the land was sold, and which debts the son paid,—can not be set aside as fraudulent, or declared a general assignment; though if the conveyance had not been absolute, but made to the grantee in trust for the payment of such debts, it would amount to a general assignment, under our statutes.

APPEAL from Chancery Court of Sumter.

Heard before Hon. A. W. DILLARD.

James Abrahams, the appellee, sought by his bill against Samuel Eskridge, jr., the appellant, to annul a certain deed made to said Samuel Eskridge, jr., by his father, Samuel Eskridge, sr., on the ground that it was made with intent to hinder, delay or defraud creditors, and in event the deed was not assailable on that ground, to have it declared a general assignment, and to hold Eskridge, jr., liable as an executor *de son tort* for the property received, &c.

The case made by the bill, answer and testimony, may be thus stated: On the 18th day of December, 1866, Samuel

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Eskridge, sr., was indebted to Abrahams in the sum of \$482, due by promissory note, which at the time of the filing of the bill was still a subsisting liability. On the 18th day of December, 1866, said Samuel Eskridge, sr., conveyed by absolute deed of bargain and sale, all of his real and personal estate, liable for payment of debts, to his son, Samuel Eskridge, jr. The recited consideration was "the sum of \$4,346, in hand paid, receipt whereof is hereby acknowledged." This sum probably exceeded the fair value of the property conveyed. When this deed was executed, Samuel Eskridge, sr., was in his last illness, and he died in a few days afterwards. He left a considerable family, and no assets subject to administration, all of his property liable to the satisfaction of his debts having been conveyed, as before stated, to his son; and no administration has been had on his estate. The extent or amount of his indebtedness is not very clearly shown, and the bill does not allege the existence of any other creditors than the complainant. It appears, however, that he left outstanding debts, to the amount of the value of the property conveyed to his son. At the time of the conveyance, the father resided on the lands conveyed, and the son took and still holds possession under the deed.

The cause was submitted for final decree, on bill, answer, and testimony. The complainant offered his own deposition, and that of Reuben Chapman. Defendant offered his own deposition, and that of May, which had been taken by complainant, but not offered by him. The evidence very clearly proved the consideration, amount, and validity of the note held by complainant.

Abrahams testified, that the property conveyed was worth from five to eight thousand dollars, "according to general information," but he had no personal knowledge of the value; that he never heard of Samuel Eskridge, jr., having any property, and that his credit was not good at complainant's store; that Samuel Eskridge, jr., promised to pay the debt, and had stated to him that his father made the conveyance to enable him to pay off his debts.

Chapman testified, that he was a neighbor of Samuel Eskridge, sr., and learning of his illness went over to see him. When he arrived, May, who was a subscribing witness to the deed, informed him that Eskridge, sr., desired May to write his will, and he (May) preferred that Chapman would do it. "May stated that the deceased had some apprehension of trouble in reference to his administration, during the war, of the estate of his son-in-law John Smith, and on that account

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thought it necessary to make a will." Neither Samuel Eskridge, sr. or jr., were present when this remark was made. "At this time I had no information but what had been communicated to me by Mr. Sprott, and corroborated by Mr. May." I was in deceased's room but very little. He seemed extremely ill, but was perfectly intelligent, and I had occasion to interrogate him to get the facts to be embodied in the instrument. I did not give any advice, but I did say "to Parson May that a will would not accomplish the purpose indicated."

May testified, that he was with Samuel Eskridge, sr., about nine hours before the deed was executed. Deceased was then quite sick, and something was said about making a will for him. Deceased requested a will to be made, and that I should write it. I requested Gov. Chapman to write it, but this was not done by either one of us. Nothing was said by him about any liability on any bond. "No will was written, because he could not do what he wanted to do by will." I asked him if he intended to make any provision for his family, and he said "they would have to take care of themselves; that he intended to pay his honest debts." This witness further testified, that Samuel Eskridge, jr., had some property before the deed was made, and that his father owed him a considerable sum for work done on the farm, &c.; that the property sold was not worth over three thousand dollars. The father and son had some negotiations about the sale of the lands several weeks before the deed was made. "The intention of Samuel Eskridge, sr., in making the deed was to pay what he owed his son, and enable the son with the balance of the property to pay the other debts." This witness further testified, that deceased told him he was not on any bond; that he had been discharged from the only bond on which he had been liable. The son paid off the incumbrance on the lands conveyed—being the amount due for the purchase-money. He paid a debt to W. G. Little of about \$800 or \$1,000, and about \$1,700 to A. W. Cockrell on account of the purchase-money of the lands. He also paid Dr. Huston's medical bill. "He also paid other debts of his father. He paid me one." Samuel Eskridge, jr., has paid more than the full value of the land. About the time the deed was made, deceased said he could make no provision for his family, but that "he did not believe his son, Samuel, jr., would get married, and he believed he would take care of the family."

The defendant, Samuel Eskridge, jr., testified, that at the

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time of the execution of the deed he owned \$1,000 in money and two horses; he had also made considerable money the fall before in building gin-houses and screws; that his father owed him for services after he became of age, and for cotton which his father sold. He did not pay his father any thing, but assumed certain debts of his father amounting to the purchase-money. The property was hardly worth that amount. In answer to cross-interrogatories, he testified, that the consideration of the deed was what his father owed him, and the son's assumption of certain debts, which he set forth, amounting in all to \$4,392. "My assuming the debts was considered by my father as cash. It was his purpose to pay his debts, and this is the reason the deed recites the purchase as a cash transaction. He was relieved from all further responsibility." The answers to the cross-interrogatories were suppressed for some informality.

The chancellor decreed that the deed was fraudulent as to complainant, and also amounted to a general assignment, and directed a sale for the payment of the amount of the note, as ascertained on reference to the register. This decree is now assigned as error.

SNEDICOR & COCKRELL, for appellant.

R. H. SMITH, and THOS. COBBS, *contra*.

STONE, J.—The recited consideration of the deed, which the bill in this case seeks to set aside as fraudulent, is four thousand three hundred and forty-six dollars. There is no testimony that the land and other property was worth more than that sum, or even that much. On the contrary, the testimony tends to show that the property conveyed was not worth that sum. Eskridge, the defendant, testifies that when he made the purchase he paid no money, and that by the terms of the purchase, he was not to pay any thing to his father, the vendor. He was to pay to certain creditors of his father, sums of money which amounted to the purchase price of the land. He testified in his cross-examination that he had made payments to various named creditors of his father, amounting to the aggregate sum of forty-three or forty-four hundred dollars. True, this part of his deposition was suppressed; but it furnished the complainant information of the persons to whom he alleged he had made payments, and thus enabled him to disprove the alleged payments, if the claim was false. The testimony of May,

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taken by complainant, but not offered by him, corroborates Eskridge as to the conditions of the purchase, and the agreed manner of payment; and this witness proves that Eskridge, jr., had paid the debts he had agreed to pay. As we said above, if Samuel Eskridge, the younger, did not pay these debts, as his own testimony and that of May tends to show, ample means was furnished complainant to disprove the pretense, and he has failed to do it. It is manifest that the testimony in this case is less full than it might be made. Still there is enough, unrebutted as it is, to produce a reasonable conviction that Samuel Eskridge, jr., paid the debts of Samuel Eskridge, sr., which, by the terms of the purchase, he agreed to pay; and there is not only a failure to prove the property was worth more than the price promised and paid, but the testimony is that the property was worth less.

Much stress is laid on the fact that Gov. Chapman testifies that a will was first spoken of, and that he informed Mr. May that the object contemplated could not be carried out by a will. Neither he nor any other witness explains what is here meant. If the object was that all the property should go to all the debts in equal proportion, then that object could have been accomplished by a will, or the law would have accomplished it, less dower and exemptions, without either will or deed. We suppose his object was to pay certain debts with his property, which would, in effect, give a preference to certain named creditors over others. A debtor, not owning property sufficient to pay all his debts, may, by a sale made in good faith, devote his entire property to certain of his debts, and leave his other debts unprovided for. *Crawford v. Kirksey*, 55 Ala. 282. And, in such case, it matters not whether the property, if sold for its fair market value, is transferred to the creditor himself, or sold to another, and the payment made to the creditor. When the consideration-money is the reasonable value of the property, is actually paid by the purchaser, and goes to the *bona fide* creditor of the seller, there is no fraud in such transaction, although other creditors equally meritorious lose their demands. Failing debtors have the right to prefer one creditor to another by an honest sale, unless they thereby secure some benefit, bounty, or secret trust for themselves or families. We think Gov. Chapman's advice in this case was based on the communicated wish of Samuel Eskridge, sr., to devote his property to certain named debts. The testimony of May goes to prove this; for he testifies that Samuel, sr., stated his object was to pay his debts, and that he could not make

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any provision for his family. We think the testimony justifies this conclusion, and we fail to find anything in this circumstance, tending to establish fraud or secret trust.

As we understand the testimony in this record, it does not tend to show that the property was transferred to the younger Eskridge *in trust* for the payment of the elder Eskridge's debts. If such were the case, then it would have the properties of a general assignment, for it conveyed everything of value which the grantor owned.—See authorities collected in *Crawford v. Kirksey*, 55 Ala. on page 302. The present transaction was an absolute sale and conveyance from father to son, with the stipulation that the purchase-money was to be paid to certain creditors of the grantor, and not to the grantor himself. This does not change its quality, as a deed of bargain and sale. It is not a general assignment.

There is an entire failure of proof in this case that the support of grantor's family was to be any part of the consideration of the conveyance. True, he expressed the belief that his son would not marry, and that he would "take care of his, grantor's family." This would be but the discharge of a filial duty, which might be expected of a dutiful son. The witnesses, May and Eskridge, testify that there was no agreement to that effect. This declaration of the dying father can not avoid the present conveyance, which is otherwise shown to be a deed of bargain and sale, upon full consideration paid. If there was simulation of payment, or secret trust, it has not been proved.

The decree of the chancellor is reversed, and a decree here rendered dismissing complainant's bill.

Reversed and rendered.

Galbreath v. Cole, et al.

Action on Account, &c.

1. *Plea; what bad.*—A plea professing to answer the whole declaration or complaint, is bad on demurrer, if it answers part only.

2. *Same.*—A count for "*goods sold and delivered*" covers a sale, at a stipulated price for cash, or on a credit which had expired before suit was brought; and as the statute of limitations of three years, applies only to open accounts, where some term of the contract is not settled by the parties, the plea, when interposed to a demand for "*goods sold and delivered*," is bad on demurrer, unless it states that the demand was an open account.

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3. *Agency; what not sufficient proof of.*—The mere fact that a person claiming to be the agent of plaintiffs, had a statement of an account due them, made out in the handwriting of their book-keeper, is not of itself sufficient proof of the agency.

4. *Same.*—When the evidence does not show the authority of one professing to be agent of a creditor, for the collection of a claim, transactions between the debtor and such person, or statements by him, not known to the creditor, or afterwards ratified by him, are inadmissible against the creditor; and proof of efforts of the debtor to find such person, and to obtain his deposition, is irrelevant.

APPEAL from Blount Circuit Court.

Tried before Hon. LOUIS WYETH.

Appellant, as surviving partner of Galbreath, Stewart & Co., brought this action against the appellees, as late partners of the firm of Lewis Cole & Son. The complaint contains three counts: the first on a promissory note, made by defendants; the second, on account stated; and the third, for goods, wares and merchandise, sold and delivered. The defendants pleaded, in short by consent: "1. *Non assumpsit*. 2. Payment. 3. Set-off. 4. The statute of limitations of three years. 5. The statute of limitation of six years. 6. Want of consideration. 7. Failure of consideration." The fourth plea was demurred to, "because said plea is not an answer to the several counts in plaintiff's complaint;" second, "because the said plea does not allege that the action is upon an open account, and the said complaint does not show the same." This demurrer was overruled. The plaintiff introduced evidence, which supported the common counts of his complaint, and the defendant relied on an alleged payment, made under the following circumstances: During the fall of 1870, one Moore, who pretended to be the agent of plaintiffs, met defendants at Somerville, Ala., and agreed with them to accept from them ten bales of cotton delivered at Decatur, Ala., in full payment of the claim sued on, and one due by defendants to Terry & Mitchell, a firm which he represented. Moore, at that time, represented that he was the agent of plaintiffs, and had authority to settle their claim; and he in fact then had with him a correct statement of the defendant's account with plaintiff, in the handwriting of plaintiff's book-keeper, one Hoadley, which he exhibited as proof of his agency. This was all the evidence tending to prove the agency of Moore, and plaintiff objected to its introduction, on the ground of irrelevancy, and insufficiency to establish the agency of Moore. The court overruled the objection, and he excepted.

Defendants then proved that they had complied with the

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agreement made with Moore, and had delivered the ten bales of cotton at Decatur, and in obedience to an order of Moore shipped the same to Terry & Mitchell. Defendants, against the objection and exception of the plaintiff, were permitted to prove that it was customary for merchants residing where defendant lived, to buy goods at various places and pay for the same in cotton. Defendants also introduced evidence, tending to show that since the commencement of this suit they had diligently endeavored to ascertain the whereabouts of Moore, and to take his deposition in their behalf, but they had been unable to obtain his evidence. This evidence was objected to by plaintiff, and an exception reserved to its admission. The various rulings to which exception was reserved, and the overruling of the demurrer, are now assigned as error.

C. F. HAMILL, for appellant.

JOHN W. INZER, *contra*.

BRICKELL, C. J.—1. The complaint contains three counts, the first on a promissory note made by the defendants, the second, on an account stated, the third, for goods and merchandise sold and delivered. The fourth plea, directed to the entire complaint, is of the statute of limitations of three years, which bars only actions founded on open accounts. It is obvious the plea is not an answer to the first or second count. An elementary rule of pleading is, that a plea professing to answer the whole complaint or declaration, is bad on demurrer, if it is an answer to a part only—1 Chit. Pl. 523; *Adams v. McMillan*, 7 Port. 75; *Deshler v. Hodges*, 3 Ala. 509; *Standifer v. White*, 9 Ala. 527; *Mills v. Stewart*, 12 Ala. 90; *White v. Yarborough*, 16 Ala. 109; *Tompkins v. Reynolds*, 17 Ala. 109; *Wilkinson v. Mosely*, 30 Ala. 562. Nor was the plea an answer to the third count of the complaint. An open account affected by the statute of limitations of three years, is one in which some term of the contract is not settled by the agreement of the parties.—*Maury v. Mason*, 8 Port. 20; *Shephard v. Wilkins*, 1 Ala. 62; *Caruthers v. Mardis*, 3 Ala. 599; *Mims v. Sturdevant*, 18 Ala. 359; *Bradford v. Barclay*, 39 Ala. 33. The count so far from disclosing that any term of the contract of the sale of the goods was unadjusted by the agreement of the parties, is broad enough to cover a sale at a stipulated price, for cash, or on any credit expiring before the commencement of the

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suit. The plea to have been an answer to the count, ought to have averred the demand stated in it was an open account. *Winston v. Trustees of University*, 1 Ala. 124; *Brooks v. McFarland*, 20 Ala. 483; *Harrison v. Harrison*, 39 Ala. 489. The demurrer on the several grounds assigned, was well taken, and ought to have been sustained.

2. The declarations or conduct of one professing to act as the agent of another, are inadmissible evidence against the principal, without independent proof of his authority.—2 Whart. Ev. § 1184; *Scarborough v. Reynolds*, 12 Ala. 252; *McDougal v. Dawson*, 30 Ala. 553. The authority may, like any other fact, be proved by circumstances. Express, direct evidence, that it was conferred, is not indispensable. The circumstances must be such as are capable of affording a reasonable presumption of it; and if they are not, they are not only insufficient, but inadmissible. The only circumstance shown from which the authority of Moore was to be inferred, was the fact that he had a statement of the account due the plaintiffs, in the handwriting of their book-keeper. If the presumption could be drawn that the book-keeper had entrusted the account to Moore for collection, from his act only, could the presumption be drawn, that he had authority from the plaintiff to appoint Moore their agent, and thus the act of an agent would be converted into evidence of his authority. There was no evidence of Moore's authority to act for, or bind the plaintiff, and the court should have excluded all evidence of the transactions between him and the defendants.

3. Irrelevant evidence, facts and circumstances from which no fair and just inference can be drawn, should not be admitted. "The propriety of this rule must be admitted by all, when we reflect that every fact or circumstance given in evidence may be controverted, and if a party could be permitted to give in evidence facts or circumstances which could afford no light, by which to ascertain the truth of the material matter in dispute, many embarrassing questions would be presented, both for the court and jury, which, when solved would not advance us one step in the material inquiry. Such questions might embarrass the court, and often mislead the mind of the jury from the true matter or point in dispute."—*Governor v. Campbell*, 17 Ala. 574. The question in dispute was the authority of Moore to control and collect the debt due from the defendants to the plaintiff. Whatever may have been the diligence of the defendants to

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obtain the evidence of Moore, it had no relevancy to this inquiry, and should have been excluded.

The errors of the several rulings of the Circuit Court, to which exceptions were taken, are apparent, and the judgment is reversed and the cause remanded.

Wagner v. Simmons & Co.

Action on Bill of Exchange.

1. *Rebutting examination; discretion of lower court as to.*—The general rule that a rebutting examination must be confined to the matters of the cross-examination, is not inflexible, but may be varied in the discretion of the presiding judge, according to the circumstances of the particular case; and the appellate court will not interfere with the exercise of such discretion, unless it be very clear that the party complaining has been injured.

2. *Same.*—The mere repetition in rebuttal, of facts stated by the witness on his original examination, does not injure the party against whom his deposition was taken, and is not ground for reversal.

3. *Commercial partnership; what constitutes.*—A partnership in the business of buying cattle and slaughtering them for sale, and dealing in vegetables and like commodities, is a commercial partnership; each member of which has the right to draw, accept, or endorse, bills of exchange in the firm name, and bind the partnership, as to third persons, dealing fairly and in good faith, as to matters usually incident to the business; and it is immaterial in such a case, as to a person thus dealing with one of the partners, that the other was not informed of the transaction, and repudiated it as soon as it came to his knowledge.

4. *Charges, refusal of; when not revised.*—The refusal of charges requested will not be revised, unless it is affirmatively shown that such charges were requested in writing.

APPEAL from Mobile Circuit Court.

Tried before Hon. H. T. TOULMIN.

The appellees, as assignees of LeBaron & Son, brought suit against Louis Wagner and Charles Rawls, late partners under the style of Wagner & Rawls, upon an account due LeBaron & Son, and also to recover the amount due upon a draft drawn on the 14th day of October, 1874, by Wagner & Rawls on L. P. Wagner, payable to the order of LeBaron & Son, for one thousand dollars, which Wagner refused to accept, and which was duly protested, &c. Rawls was not served, and there was a discontinuance as to him. Wagner filed his sworn plea of *non est factum* as to the draft, and pleaded the general issue as to the account.

The appellees had taken the deposition of Rawls. After

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this deposition was taken, Wagner discovered a letter written to him by Rawls, and obtained leave to retake his deposition upon additional cross-interrogatories, asking if he wrote the letter, and the date thereof; a copy of the letter being made an exhibit. The plaintiffs then filed five additional interrogatories. The letter referred to, was in relation to the draft in suit, and stated that Rawls had borrowed the money on his own account, and had made it all right, as it was a matter that "you [Wagner] and the business have nothing to do with." The additional interrogatories thus filed, inquired whether the firm did not get the benefit of the money on the draft; whether LeBaron & Son agreed to look to Rawls, or advanced the money on the credit of the firm; whether the facts stated in the witness' first deposition were not true, and required the witness to state the circumstances under which the letter was written. The substance of these matters had already been inquired of on the interrogatories propounded to the witness, and answered by him in his deposition, except as regarded the letter.

At the time of the filing of these interrogatories, Wagner objected to each of them, with the exception of those relating to the letter, on the ground that the interrogatories were leading.

Before entering on the trial, the defendant moved to suppress all that part of the deposition of Rawls which had no reference to the letter; basing the motion upon the grounds of objection filed to the interrogatories. The court overruled this motion, and the defendant excepted.

Rawls & Wagner formed their partnership in January, 1874, and it continued until April 16th, 1875, during which period they carried on the business of butchers and green grocers, in Pensacola, Florida. Their principal trade was in supplying vessels in the harbor with cattle, sheep, vegetables, &c. Rawls resided in Pensacola and had charge of the business, while Wagner was seldom there, being principally in New Orleans and Mobile, where he bought and forwarded cattle and vegetables to Rawls to be disposed of for the firm account. The sales of the firm amounted to as much as \$18,000 per annum. As soon as Wagner learned of the draft, he refused to pay it, and repudiated Rawls' authority to draw it. He testified that Rawls had no authority to borrow money, and that he, Wagner, never knew that Rawls kept any account in the firm name; that there was no necessity for Rawls to borrow money, as he, Wagner, bought supplies and sent them to Rawls, whose duty it was to sell

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them and remit the proceeds to him, Wagner. The evidence shows that the draft was drawn to make good the account of the firm which Rawls kept with LeBaron & Co., who had allowed Rawls to overdraw to that amount on account of the firm and on its credit. LeBaron & Co. were bankers and commission merchants in Pensacola, and it is not shown that they had any notice of any limitations in the partnership articles, or knew of the letter of Rawls to Wagner, until after this suit was brought. The plaintiffs' ownership of the draft was admitted. This was substantially all the evidence.

The court charged the jury, among other things, "if they believed from the evidence that Wagner was a member of the firm of Wagner & Rawls at the time the bill of exchange sued on was drawn, and that it was drawn by said Rawls as one of the firm, then they must find for the plaintiffs on the count on the bill of exchange, and in case they found for the plaintiffs, they were entitled to recover the amount of the bill, and interest from the time it was protested, with five per cent. damages on the amount of the bill." The defendant duly excepted to this charge. He also asked two charges, which the court refused; to which refusal he duly excepted. It does not appear that these charges were asked in writing.

The charge given, the refusal to charge as requested, and the ruling upon the deposition of Rawls, are now assigned as error.

BOYLES & OVERALL, for appellant.—The business in which Rawls & Wagner engaged, did not authorize the partners to draw bills of exchange and bind the firm.—6 Ala. 94; 34 Ala. 613. Where one person borrows money on his individual credit, and applies it to the use of the firm, this does not make the original creditor a creditor of the firm, unless the money is applied with the knowledge and privity of his partner.—35 Barbour 120. This was not a *commercial partnership*.—57 Pa. State, 531. It was an abuse of discretion to allow these parties to put leading questions to their own witness.

ANDERSON & BOND, *contra*.—Under the issue, the only question was as to the authority to draw the bill. There can be no doubt on this point.—*Jemison v. Dearing*, 41 Ala. 283. The charge of the court when construed in connection with the evidence and the issue joined, was clearly correct. 41 Ala. 413; 22 Ala. 221; 41 Ala. 283; 8 Ala. 59; 7 Ala.

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19. It was clearly within the discretion of the court to permit a leading question, or to allow a witness to repeat what he had already testified. The letter which Rawls wrote Wagner was not known to LeBaron & Co. at the time of the transaction, neither were the terms of the partnership articles, and of course could not affect LeBaron & Co.'s rights or those claiming under them. It was not attempted to be shown that either of these matters were known to LeBaron & Co. in their dealings with Rawls. As to the other charges, which were refused, it does not affirmatively appear that they were asked in writing.—*Crosby v. Hutchinson*, 53 Ala. 5.

BRICKELL, C. J.—The general rule, that a rebutting examination should be confined to the matter of the cross-examination, is not inflexible. Its application, rests largely in the discretion of the presiding judge, with the exercise of which appellate tribunals are reluctant to interfere, unless it is apparent injury has been suffered by the party complaining. We do not perceive that the appellant could have been injured by the mere repetition by the witness in rebuttal, of the facts stated by him in his original examination. The court may also in its discretion, permit a party to propound a leading question to his own witness; and the exercise of this discretion can be rarely revised on error. We are unwilling to pronounce that the court erred in overruling the objections to the evidence of the witness Rawls.

2. Nor is the charge of the court to which an exception was taken objectionable. It is a legal consequence of every commercial partnership—every partnership engaged in buying, selling or exchanging—that each partner is the general agent of the firm, and has power to act for, and bind it, in all matters within the scope of the partnership business. And it is within the scope of such business, to borrow money, to draw, accept, or endorse bills of exchange or promissory notes. These are the means of conducting such business, common alike to the butcher and green grocer, and the more extensive dealer in dry goods or groceries, or to the factor, broker or banker. Whoever associates with another for the purpose of carrying on trade, confers on him as to third persons, who are not notified to the contrary, and who deal with him fairly and in good faith, authority to bind the partnership by contracts or engagements which are usually incident to the particular business in which they are engaged.—1 Am. Lead. Cases, 442; *Hart v. Clark*, 56 Ala. 19. The bill of

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exchange on which the suit is founded, was drawn for money borrowed by Rawls, in the partnership name. He had authority to borrow money for the partnership, and to draw the bill in the firm name. It is not material that the appellant had no knowledge of the transaction, and so soon as informed, repudiated it. The parties loaning the money to Rawls, and accepting from him the bill, had the right to rely on his power to bind the partnership.

There can be no reversal of a judgment, because of the refusal of charges requested, unless it is shown affirmatively by the bill of exceptions, that they were requested in writing.—*Crosby v. Hutchinson*, 53 Ala. 5; *Hollingsworth v. Chapman*, 54 Ala. 7.

Affirmed.

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Bill in Equity to enjoin Action at Law on Note, and obtain Benefit of Set-off.

1. *Commercial paper; what defenses may be made to.*—The indorsee of commercial paper acquiring it after maturity, or before maturity merely as collateral security for a pre-existing debt, takes it subject to all the defenses which the maker could prefer against the payee, if he had remained the holder; and this right exists as to matters of set-off and discount, as well as to defenses affecting the instrument itself.

2. *Set-off; what does not destroy right of.*—One of several joint debtors is entitled to set-off a debt due to him alone from the common creditor, when sued upon the joint debt.

3. *Same; when resort can not be had to equity, to enforce.*—A surety on a promissory note on which the payee or endorsee brings an action at law, can not go into equity to enjoin the action and to obtain the benefit of a set-off, when such set-off was due at the commencement of the action, and is of such a nature as to be made available at law, without embarrassment or difficulty; and the fact that the payee is insolvent is immaterial, and furnishes no ground for resort to equity.

APPEAL from Mobile Chancery Court.

Heard before Hon. H. AUSTILL.

The appellee, Charles A. Poelnitz, in November, 1875, filed his bill against the appellant, the President, Directors and Company of the Bank of Mobile, to enjoin prosecution of a pending action at law, brought by it on a promissory note made by the appellee, and others, and payable to Walsh,

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Smith, Crawford & Co., which note had come into the possession of the Bank, as hereinafter stated. In 1873, one Bruno B. Poelnitz, being indebted to Walsh, Smith, Crawford & Co. for advances to the amount of 966 73-100 dollars, executed his promissory note to them for that sum, with the appellee and one J. E. Poelnitz as sureties, payable at the Bank of Mobile on the first day of January, 1874. That firm was at the time, and still is indebted to appellee, in a much larger sum than the amount of the note, which indebtedness was past due when the suit at law was brought. Walsh, Smith, Crawford & Co. being indebted to the Mobile Mutual Insurance Company, by their promissory note for \$10,977.60, turned over as collateral, to the Insurance Company, certain notes and bonds, among which was the note on which appellee was surety, which was not then due, and after its maturity, on or about the 28th of February, 1874, the debt for which the note was held as collateral, was settled, by the purchase by the Insurance Company of certain shares of its own stock, owned by Walsh, Smith, Crawford & Co. Some of the stock had been pledged to the Bank, which in accordance with negotiations with one of the firm of Walsh, Smith, Crawford & Co., turned the stock over to the Insurance Company, and that company in obedience to instructions of Walsh, Smith, Crawford & Co. turned the note of appellee over to the Bank, which gave that firm credit for it, under the date of December 27th, 1873. The firm of Walsh, Smith, Crawford & Co. became insolvent in the fall of 1873, and they were adjudged bankrupts in 1874.

The bill sought to obtain an injunction, and set-off against the note. It was demurred to, among other grounds, because the complainant had a plain and adequate remedy at law.

The demurrer was overruled, and a decree rendered granting the relief prayed, and the Bank brings the case here by appeal.

WILLIAM G. JONES, for appellant.—If appellee is entitled at all to the set-off claimed, it was manifestly a legal right, which he could have asserted in the suit at law, against him by the Bank. His remedy and defense, were perfect at law, and there was no ground or necessity for his going into a court of equity. The demurrer to the bill on this ground, should have been sustained.—*Tate v. Evans*, 54 Ala. 16. The note was negotiable, and was transferred to the Insurance Company for value, before maturity, and by them trans-

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ferred to the Bank. It was never the property of Walsh, Smith, Crawford & Co. after its transfer by them to the Insurance Company, and the appellee can not set-off any indebtedness of theirs to him, as against the Bank.—1 Brick. Dig. 276 § 345; 8 Ala. 889; 11 Ala. 370.

ANDERSON & BOND, with whom was W. A. GUNTER, *contra*.—The right to set-off one demand against another did not exist at common law, unless the set-off originated in the same transaction; and a resort to equity was necessary in every case of distinct demands, to restrain proceeding at law.—Waterman on Set-off, 11 and 12. The fact the powers of the law courts have been extended by statute to embrace relief attainable before only in equity, does not impair the right to proceed in equity.—28 Ala. 629. The Insurance Company was not such a holder of the note as would defeat the right to set-off; having received the note as collateral for an antecedent debt, it was not a *bona fide* holder.—*Fenouille v. Hamilton*, 35 Ala. 319. But the debt to the Insurance Company was paid in full, and even if the Insurance Company had transferred the note, the appellee was entitled to set-off; for when a negotiable security is endorsed to a bank by the payee, as collateral security for one of several demands, the bank has no lien as a security for any other demand against the endorser.—*Bank v. Leland*, 5 Metc. (Mass.) 259; U. S. Digest, first series, vol. xi. p. 110, § 127.

But the Bank acquired the note from Walsh, Smith, Crawford & Co., and not from the Insurance Company, and the Bank acquired it after maturity, and it is subject to any defense in their hands, which the appellee had as against the payees.

BRICKELL, C. J.—The statute renders mutual debts, liquidated or unliquidated demands not sounding in damages merely, subsisting between the parties at the time of suit brought the subject matter of set-off.—Code of 1876, § 2991. All contracts in writing for the payment of money or other thing, or for the performance of any act or duty, are assignable by indorsement. Except as to commercial paper, the assignment is subject to all payments, sets-off and discounts, had or possessed against the same previous to notice of the assignment or transfer.—Code of 1876, §§ 2099, 2100. The exception in favor of commercial paper relieves it from liability to set-off, only when it has been negotiated in good faith before maturity.—Code of 1876, § 2995. The indorsee

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of commercial paper acquiring it after maturity, or before maturity, merely as collateral security for a pre-existing debt, takes it subject to all defenses which the maker could prefer against the payee, if he had remained the holder.—*Glasscock v. Smith*, 25 Ala. 474; *Fenouille v. Hamilton*, 35 Ala. 319; *McKenzie v. Br. Bank Montgomery*, 28 Ala. 606; *Culom v. Br. Bank Mobile*, 4 Ala. 2. The rule has been sometimes limited to defenses affecting the instrument itself, as a want, or illegality, or failure of consideration. But in *Carroll v. Malone*, 28 Ala. 521, it was after very careful consideration of our statutes, from which the provisions of the Code do not materially vary, held, that the indorsee was subject to set-off, and discounts, as well as to defenses, affecting the instrument itself.

Applying these principles to the present case, the right of the appellee to the set-off claimed, seems clear. We concur with the chancellor in the opinion that the evidence discloses that the appellant acquired the note made by the appellee on which the appellant has commenced suit at law, by negotiation with and transfer from Crawford, Walsh, Smith & Co., and not by transfer from the Insurance Company. The transfer was on the 28th day of February, 1874, after the maturity of the note, and was subordinate to the appellee's right of set-off. This right is not affected by the fact that the debt owing him by Crawford, Walsh, Smith & Co., was due him individually, and the debt due them was the joint debt of the appellee and others. The uniform construction, the statute of set-off has received, is, that one of several joint debtors, is entitled to set-off a debt due to him alone from the common creditor.—*Pitcher v. Patrick*, Minor, 321; *Carson v. Barnes*, 1 Ala. 93; *Jones v. Jones*, 12 Ala. 244; *Sledge v. Swift*, 53 Ala. 110.

The suit at law against the appellee was commenced after the maturity of the debt which he prefers as a set-off. We can not therefore perceive the necessity for a resort to a court of equity, to obtain relief which the statutes expressly secure to the appellee, if at law, the set-off is pleaded. True the bill avers, and the averment is proved, that Crawford, Walsh, Smith & Co., are insolvent, and their insolvency would furnish just ground for equitable intervention, if there was difficulty or embarrassment in making the set-off available at law; or if the law did not provide for it as a set-off. *T. C. & D. R. R. Co. v. Rhodes*, 8 Ala. 206; *Donelson v. Posey*, 13 Ala. 752; *White v. Wiggins*, 32 Ala. 424. But the set-off being due at the commencement of the suit, and

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the statute declaring it as available against the assignee, or indorsee, as it would have been against the assignors, or indorsers, there is no ground of equity jurisdiction. The result is, the decree must be reversed, and a decree here rendered dissolving the injunction and dismissing the bill at the costs of the appellee.

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Indictment for Conveying Instrument in Jail Useful to aid Escape of Prisoner, &c.

1. *Code, § 4130 of, construed.*—Section 4130 of the Code, is not merely declaratory of the common law as to aiding the escape of a prisoner charged with felony, but creates a new offense, substantive and not accessorial in its character.

Same; indictment under, when sufficient.—The offense thus defined, has three main ingredients; first, a prisoner confined under a lawful charge or conviction of felony; second, the conveying into the jail, &c., of some disguise or instrument useful to aid the escape; and third, the intent thereby to facilitate the escape of such prisoner; and an indictment charging the offense substantially in the language of the statute is sufficient, though it does not aver that the defendant knew the prisoner was confined on a charge of felony.

APPEAL from Dallas Circuit Court.

Tried before Hon. GEO. H. CRAIG.

The appellant, Henry Wilson, was convicted and sentenced to two years' hard labor for the county, under an indictment which charged that before the finding thereof, he "did convey into the county jail of Dallas county, Alabama, an auger, an instrument useful for the purpose, to aid Wiley Jones and Henry Johnson, *alias* John Cunningham, at the time being prisoners confined in said jail, under the charge or charges for the criminal offense of burglary, with the intent to aid and facilitate the escape of said Wiley Jones and Henry Johnson, *alias* John Cunningham, from said confinement in said jail, against the peace," &c.

The defendant demurred, on the ground that the indictment did not aver that the defendant had knowledge, that said Jones and Johnson, were confined under any charge of felony. This demurrer was overruled, and afterwards the defendant moved in arrest of judgment on the same grounds as those upon which his demurrer was based; but this motion was also overruled.

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B. F. SAFFOLD, for appellant.—1. The common law requires that acts which are felonies must be alleged to have been *feloniously* committed.—*Butler v. State*, 22 Ala. 43; *Beasley v. State*, 18 Ala. 535. It is only where the statute creates a new offense, unknown to the common law, and describes its constituents that it is sufficient to charge the offense in the language of the statute.—1 Brick. Dig. p. 499, §§ 734, 738.

It is no offense to aid to escape one who is unlawfully imprisoned in jail, without charge or indictment. It is only misdemeanor to so aid one charged with, or indicted for, misdemeanor. But, it is felony to so aid one charged with felony. Therefore knowledge of the facts on the part of the accused which so grade his act, must be an indictable ingredient. Felonious intent is essential to the commission of felony, and inseparable from the knowledge of the *facts* which constitute it.

2. In *Rex v. Burridge*, 3 P. Wms. 439, the indictment was held defective in not charging that defendant knew the principal was guilty or convicted of felony.—1 Russ. on Crimes, p. 556-7 (1st Amer. ed.) In *Beastead's case*, Cro. Car. 583, where averment of knowledge was held not necessary, Hawkins (P. C. C. 21, § 7) says that this opinion is not proved by the authority of the case.

Bishop says any assistance given to one *known* to be a felon to escape, or hinder his being apprehended or tried, makes him accessory after the fact.—2 Bish. Crim. Law, § 927. Sections 4125-6-7-30-31-32-33 of the Code, are all which relate to escapes, and all grade the punishment according to the *animus* of the offender. *Voluntary* escape by officer is felony, and *negligent* escape by officer a misdemeanor, without regard to the grade of crime of the prisoner escaping. A convict, who *knows of what he is convicted*, has his punishment doubled. So must it be with one who aids a prisoner to escape—otherwise one who gave aid to another committed for felony, but indicted for misdemeanor, according as the aid was given before or after indictment, of which he knew nothing, would have his guilt depend on these circumstances, without regard to his *animus*.—*Rex v. Young*, 1 Russell, 391; *United States v. Keene*, 5 Mason R. 453; Chit. Crim. Law, vol. 2, p. 165.

¶ H. C. TOMPKINS, Attorney-General, *contra*.—The ingredients of the offense for which defendant is indicted, as it is defined by the statute, are, 1st, conveying into the county

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jail some disguise, instrument or arms, useful to aid any prisoner to escape; 2d, the intent to facilitate the escape of some prisoner therein confined; and, 3d, such prisoner must be one confined under a charge or conviction of felony. The indictment charges each of these substantive facts. But it is insisted that it is defective, because it is not averred that defendant knew that the parties so confined were held upon a charge of felony. Mr. Wharton states the rule upon this point to be that under statutes where the guilty knowledge is a part of the definition, it must be averred, but not otherwise.—1 Crim. Law, § 297. The offense is not a common law offense. The common law made one who aided a prisoner to escape, an accessory after the fact; there something more than a mere attempt was necessary. The statute makes the act of conveying the instrument into the jail, with the intent to facilitate the escape of the person charged with a felony, the offense. The common law offense is assistance to one breaking prison to aid him in his undertaking.—2 Wharton's Crim. Law, § 2615. It has been held in this State that the offense of burglary as defined by our statute, is of statutory creation, and that an indictment charging the offense in the words of the statute, was sufficient.—Mason & Franklin's case, 42 Ala. 545. There is certainly much more similarity between the common law and statutory burglary, than there is between the offense charged here and any known to the common law.

STONE, J.—Indictments, under our statute, Code of 1876, section 4785, "must state the facts constituting the offense in ordinary and concise language, without prolixity or repetition, in such a manner as to enable a person of common understanding to know what is intended, and with that degree of certainty which will enable the court, on conviction, to pronounce the proper judgment." The Code contains many forms of indictment, which were intended to supplant the verbose forms used at common law; and the statute, Code of 1876, § 4824, declares that these "forms of indictments, in all cases in which they are applicable, are sufficient; and analogous forms may be used in other cases." Many of these forms, tested by common law principles, are wanting in many material averments, yet, we have uniformly held they are sufficient. "Where a statute creates a new offense, unknown to the common law, and describes its constituents, it is sufficient to charge the offense in the language of the statute. 1 Brick. Dig. 499, § 734.

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The defendant was indicted under section 4130 of the Code of 1876. Aiding a prisoner to escape, who was charged with a felony, was itself a felony at common law, because the person aiding thereby made himself an accessory after the fact. 2 Bish. Cr. Law, § 1402. To constitute this offense, the person rendering the assistance must have known the crime, the escape from the punishment of which he aided, had been committed. This knowledge on his part was an indispensable ingredient, without which he could not be a criminal accessory after the fact. The statute under which this defendant was indicted is not merely declarative of the common law. It creates a new offense, substantive and not accessorial in its character, and makes it a felony. It punishes not only him who aids in an escape from confinement under a charge of felony, but every person who attempts to render such assistance, by conveying "into the county jail, or into any other lawful place of confinement, any disguise, instrument, arms, or other thing useful to aid any prisoner to escape, with the intent to facilitate the escape of any prisoner therein lawfully confined under a charge or conviction of felony; or who, by any other act, or in any other way, assists such prisoner to escape, whether such escape be attempted, or effected, or not." The offense has three main ingredients; a prisoner confined under a lawful charge or conviction of felony, the conveying into the jail, &c., of some disguise, instrument, &c., useful to aid the escape, and the intent to facilitate the escape of such prisoner. These, the statute declares, constitute the offense, and it is not for us to add to them. The prisoner thus confined may make no attempt to escape—may not even know the disguise or instrument has been conveyed into his prison. His participation or knowledge can neither add to nor diminish the criminality of the act of conveying the alleged disguise or instrument into the prison. The statute defines the offense fully, and does not affirmatively require knowledge of the offense or grade of offense with which the prisoner is charged. The fact that the prisoner is in jail, or in other place of confinement, and needs, or is supposed to need some instrument or disguise to facilitate his escape, doubtless satisfied the legislature that any one conveying such instrument or disguise into the prison with intent to facilitate such prisoner's escape, must have known the confinement was involuntary, and on a charge of grave import. Such aid is unlike that furnished to an offender at large, fleeing from arrest. Assistance rendered in the latter case is innocent charity, if rendered in ignorance that the

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person assisted had committed a crime, and was trying to avoid arrest.

The indictment in this case conforms to the statute. It avers that Jones and Johnson, alias Cunningham, were, at the time, confined in the jail of Dallas county under a charge of the criminal offense of burglary, and that defendant did convey into the county jail of Dallas county an auger, an instrument useful for the purpose, with the intent to aid and facilitate their escape from said confinement in said jail. Every species of burglary under our statutes is a felony.—Code of 1876, §§ 4343, 4344. The indictment avers that the prisoners were confined on a charge of burglary. This is an averment that their imprisonment was under a charge of felony. The indictment is sufficient, and the judgment of the Circuit Court is affirmed.

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Action on Promissory Note.

1. *Promise to pay debt of another; when will not support action.*—A promise to pay the debt of another will not support an action, unless founded on a precedent liability or a new consideration.

2. *Same.*—Where, however, by the arrangement between the creditor and the promissor, the original debtor is discharged, and a new debt is created binding on the promissor alone, the promise, whether verbal or written, is supported by a valuable consideration—the detriment to the promisee in the extinguishment of the original debt—and will support an action, though no consideration moved from the original debtor to the promissor, and though there was no request from the original debtor, or subsequent assent on his part. (*Overruling, on last point, Williams v. Sims, 22 Ala. 512*).

APPEAL from Dallas Circuit Court.

Tried before Hon. M. J. SAFFOLD.

Lovelace brought suit against Underwood on several promissory notes which the latter had executed to him. Pleas: want of consideration, and that the notes were given for the debt of a third person, one Butler, without any consideration therefor, on the request of plaintiff. There was a jury trial, and verdict and judgment for the plaintiff.

The evidence shows that before the breaking out of the late war, one F. G. Butler, a nephew of defendant, was employed by plaintiff, and owed him, and the firm of which plaintiff was a member, several hundred dollars. Butler vol-

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unteered in the service of the Confederate States. Before he left, plaintiff suggested that he ought to make some arrangement to pay his debts, and Butler replied he would request his uncle to pay them for him, as he was satisfied he would do so. After this Butler contracted other indebtedness with plaintiff. There was evidence that defendant was much attached to Butler, and said he "intended to make him and two other persons his heirs." After Butler's death, some time in 1863 or 1864, Lovelace presented the account to Underwood, who paid two hundred dollars on it, and executed the notes sued on, for the remainder of the account. Lovelace credited the account with the cash payment and the notes, and left it with Underwood.

Underwood testified that he executed the notes because "Lovelace worked upon his sympathies;" that the accounts were not transferred to him, but he took them, as he informed Lovelace, merely to deliver them to Butler's mother; that he never authorized Butler to contract any debts on his (Underwood's) account; that he never owed Butler or Lovelace anything, and never expected to realize one cent on the accounts; and that he never received any request from Butler to pay his debts, and had not seen him in two years before his death.

The court charged the jury, "if they believed from the evidence, that before the death of Butler, there was an agreement or understanding between Butler and plaintiff and defendant, that defendant would pay what Butler owed, and that after Butler's death the notes sued on were given by Underwood in pursuance of such understanding, the plaintiff was entitled to recover to the extent Butler then owed." The defendant excepted to this charge, and requested the court to charge the jury in substance as follows:

"1. Though Butler may have made such request, yet if he died before the notes were executed, his death revoked the request, and would not make his personal representative responsible to defendant, and unless Butler's representative is responsible to him, plaintiff can not recover.

"2. If the jury believe the evidence, they should find for defendant."

The charges were refused and defendant separately excepted.

The charge given and the refusal to charge as requested, are the principal errors relied on here.

JOHN WHITE, for appellant.—One man can not make an-
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other his debtor without his consent and request, and if he pay the debt without such request he can not recover of the debtor. Such a promise is without consideration.—*Williams v. Sims*, 22 Ala. 572; 7 Ala. 791; 18 Ala. 117; 2 Stewart & Porter, 267.

A proposition made by one person to another may be revoked before it is acted on. Butler's death revoked the request.—8 Wheaton, 184; *Scruggs v. Driver*, 31 Ala. 274. A payment made in pursuance of Butler's request, if he had made one, after his death was known, would not give Underwood any cause of action against Butler's estate.

JOHNSTON & NELSON, *contra*.

BRICKELL, C. J.—A promise, verbal or written, to pay the debt of another, if not founded on a precedent liability, or a new consideration, will not support an action.—*Hester v. Wesson*, 6 Ala. 415; *Beall v. Ridgway*, 18 Ala. 117; *Rutledge v. Townsend*, 38 Ala. 712; *Watson v. Reynolds*, 54 Ala. 191. But if by the arrangement between the parties, the original debtor is discharged, and a new debt is created binding alone on the promissor, the promise whether verbal or written, is supported by a valuable consideration, and will be enforced.—Brown on Statute of Frauds, § 193; 2 Am. Lead. Cases, 205; *Corbett v. Cochran*, 3 Hill (S. C.) 41; *Anderson v. Davis*, 9 Verm. 136; *Leonard v. Vradenburgh*, 8 Johns. 29; *Click v. McAfee*, 7 Port. 62; *Thompson v. Hall*, 16 Ala. 204; *Murrah v. Br. Bnk. Decatur*, 20 Ala. 392. Nor is it necessary that there should be any consideration moving between the promissor, and the original debtor.—*Minet, Ex parte*, 14 Vesey, 189. It is enough that the creditor sustains the detriment, which follows from the extinguishment of his demand against the original debtor. A different doctrine is asserted in *Williams v. Sims*, 22 Ala. 512. The privity or assent of the original debtor so that he would become liable to the promissor, it was held, was necessary to furnish a legal consideration for the promise. A debt may be paid by a stranger, or by the debtor, and as between the debtor and the creditor, the demand is extinguished by the payment, no matter from whom it proceeds. As between the debtor and the person paying, questions may arise, whether the payment was purely voluntary or not, and these may depend on the fact of previous request, or subsequent assent.—*Harrison v. Hicks*, 1 Port. 423. Such questions are not material as between the promissor and the creditor. If the debt is

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extinguished—if the creditor parts with and loses the right to proceed against, and enforce the liability of the original debtor, the detriment he sustains is a sufficient consideration for the promise, though as between the original debtor and the promissor, the promise is voluntary and gratuitous. *Corbett v. Cochran, supra.* A creditor may accept of whatsoever he will in satisfaction of a debt. He may take the promissory note of the debtor; or he may accept the promise of a stranger, verbal or written, without inquiring into the motives or consideration which induce him to the promise. Whether these are motives of generosity, or of kindness to the debtor, which would support a gift to him of the debt, or whether the promissor is moved by his request, can not affect his liability. The pre-existing debt, of legal obligation on the original debtor, extinguished as to the creditor, is a valuable consideration which will support the promise. We think the case of *Williams v. Sims*, is erroneous on this point, and inconsistent with other decisions of this court, and must be overruled.

There was evidence showing that the purpose of the appellant was to pay the debt of Butler, and that the money paid by him when he executed the notes, and the notes, were accepted by the appellees as a payment of the debt, and not as a security for it. The exceptions reserved, are all founded on the hypothesis, that the notes were without consideration, unless the payment was in consequence of a previous request from, or the subsequent assent of Butler; such request or assent not being necessary, the exceptions can not be sustained.

The judgment is affirmed.

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Action against Telegraph Company for Failure to pay Money as agreed, on a Contract for Telegraphic Money Order.

1. *Appeals from justice's court; how tried.*—Appeals from justice's judgments are to be tried on appeal according to equity and justice, and the declaration filed on appeal, is not subject to technical rules of pleading, and is sufficient if it shows in general terms a debt due, or a contract to be performed, and a breach thereof.

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2. *City Court of Selma, judgment of; when will not be reversed for erroneous ruling on demurrer.*—A judgment rendered by the City Court of Selma, the presiding judge determining both law and fact, as required when a jury is waived, will not be reversed, merely because of erroneous ruling on demurrer to defective counts of the complaint filed on appeal from a Justice's Court, if there is one good count, and the judgment is right on all the evidence, which is fully set out in the record.

3. *Payment of money order to imposter; when telegraph company is not liable for.*—An imposter at Cincinnati, sent a dispatch in the name of B., over defendant's line, to C. at Selma, Alabama, requesting C. to send a telegraphic money order to B. at Cincinnati. C. thereupon purchased of defendant, at Selma, a telegraphic money order payable to B. at Cincinnati, and defendant paid the money there to the imposter, who was the sender of the message,—*held*:

1. Where there is nothing to create suspicion in the minds of the agents of the telegraph company, it is the duty of the party of whom the request is made to remit the money, to ascertain for himself whether he who makes the request, is the person he professes to be.

2. In the absence of anything generating suspicion, the telegraph company has no right to refuse payment of the money to him in reply to whose message it was sent; and is not liable for a payment made *bona fide* to such person, though it turns out that he was an imposter.

APPEAL from City Court of Selma.

Tried before Hon. JON. HARALSON.

The appellee, Meyer, commenced this action against the appellant, the Western Union Telegraph Company, before a justice of the peace, who rendered judgment in favor of the plaintiff. The defendant appealed to the City Court. The plaintiff filed a complaint in that court containing three counts, which was afterwards amended. The third count only need be noticed, and that was as follows: "Plaintiff claims of defendant, a body corporate, the sum of fifty dollars, for that on the 2d day of October, 1875, the defendant being engaged in the business of telegraphing, and sending money by telegraphic orders, between the city of Selma in the State of Alabama, and the city of Cincinnati in the State of Ohio, received in the course of their said business from the plaintiff at Selma, the sum of forty dollars, which for a valuable consideration then and there paid by the plaintiff to the defendant, it agreed and promised in writing by 'W. M. Nettles, manager' at Selma, to pay in a reasonable time to one Max Reis, in said city of Cincinnati. The plaintiff avers that said defendant has wholly failed to pay said sum of fifty dollars, or any part thereof, to the said Max Reis, or to the plaintiff, though hitherto often requested by the plaintiff so to do. Wherefore plaintiff is damaged," &c.

This count was demurred to on the following, among other grounds: first, that it does not appear that the said Max Reis ever demanded the money at the Cincinnati office; second, the count does not show any right in plaintiff to reclaim

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the money sued for, from Max Reis, or to demand it from defendant; third, that it does not appear from the count that there was any breach of the contract before suit brought. This demurrer, as well as a demurrer to the other two counts, was overruled. The parties waived a jury, and a trial was had before the judge alone. The facts of the case are thus stated by Mr. Justice MANNING:

Appellee, Meyer, received through appellant's telegraph line, a dispatch from Cincinnati, signed "Max Reis," supposed to be from his nephew, who was then on his way from New York to Selma,—to the effect that he had lost his ticket and money between Pittsburg and Cincinnati, and desired plaintiff to send to him at the latter place, forty dollars by telegraph immediately. This was done, plaintiff being then absent, by his son and agent Marcus Meyer, who received therefor from the company's manager at Selma, a writing signed by him as manager, of the tenor following: "Received from Joseph Meyer forty dollars to be paid to Max Reis at Cincinnati, Ohio." A statement appended of the premium and cost of telegram showed that the total sum received by the company was \$42.38. The company on the same day handed over \$40, in Cincinnati, to the person who sent the dispatch to plaintiff. This was a large stout man, apparently thirty-five or forty years old with a heavy beard; but he was not known to the company's agent, or identified as a person whose name was "Max Reis." Plaintiff's nephew, Max Reis, was a youth of eighteen years, without a beard, and weighed one hundred and fifteen pounds; and on his arrival soon afterwards at Selma, his kindred there learned from him that he had not sent the dispatch imputed to him, or received the forty dollars. He was a witness, also, at the trial of this cause.

Both Marcus and Joseph Meyer immediately, and several times, demanded back the money from the telegraph company through its manager at Selma; and at his request, Max Reis was taken to the office for him to see and talk with on the subject. This manager communicated the demand to his superior in the same service, at Mobile, who was the proper person to receive it from him. And nothing having been done in the matter by the company, or response made to plaintiff's demands, he brought this suit five months afterwards before a justice of the peace, and obtained a judgment against the company for the forty dollars. From this decision the company appealed to the City Court of Selma,

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in which judgment was again rendered against the company ; and from it an appeal is taken to this court.*

W. R. NELSON, for appellant.

WHITE & WHITE, *contra*.

MANNING, J.—The judge of the City Court is authorized to decide causes upon the evidence as well as the law, unless a trial by jury be demanded by one or the other of the parties. This cause was tried by the judge alone ; and a bill of exceptions in the record sets forth for our consideration all the evidence that was submitted to him.

“All actions before justices, founded on any contract, express or implied, must be brought in the name of the party really interested therein whether he have the legal title or not.—Code of 1876, § 3603 (3204).

“The declaration or statement in a case of appeal from a justice of the peace, is not subject to the technical rules of pleading. If it shows in general terms a debt due, or contract to be performed and a breach, it is sufficient.”—1 Brick. Dig. 114, § 77 ; *Hanks v. Hinson*, 4 Port. 509 ; *Spann v. Boyd*, 2 Stewart, 480 ; *Morrison v. Morrison*, 4 Stew. 444.

Such cases are to be tried on appeal “according to equity and justice.”—Code, § 3121 (2721).

Guided by these rules, we think the amended count, third in the complaint, was sufficient, and that however defective the first and second counts may have been, yet since a trial was had upon the complaint as amended and upon evidence which is all set out in the record, the overruling of the demurrers was not an error that should work a reversal of the judgment.

In regard to the merits of the case : The contract of the company was with plaintiff to pay forty dollars for him at Cincinnati, to “Max Reis,” supposed by plaintiff to be his nephew. The money was not paid to the nephew, but to one whose name was unknown to the company. He was the person, though, who sent the dispatch to Meyer,—and was doubtless an impostor.

The company and Meyer, were both deceived. Which must bear the loss ? We find no decision in such a case.

The argument for defendant is : The company was not in fault for sending at the instance of one who seemed to be

†The opinion contains a synopsis of the argument of the counsel.

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among strangers, and represented himself to be unfortunate, a message for pecuniary relief to a person supposed to be his friend. It was the duty of this person to ascertain for himself that the dispatch was not spurious. When he sent the money, the company was entitled to consider it as intended for him who sent the dispatch. To require him before receiving it, to prove his identity or name, might deprive an unfortunate person thus detained in a place where he was not known, of needed aid from distant friends; and the company would by its refusal, subject itself to the expense and annoyance of a suit which it would probably be unable to defend.

On the other hand, it may be said: The receiver of the dispatch can not possibly know who sent it. In the absence of notice from the company to the contrary, he might justly presume that the sender of the dispatch had been vouched for to the agents of the company, by some one they knew, who was acquainted with him. It being directed that the money should be paid to a person of the name of Max Reis, it was the company's duty not to pay it to any one else. If it lacked proof concerning his identity, having control of the telegraph, it could easily through its manager at Selma have obtained from plaintiff, information of particulars, that would enable its agents, by interrogation of the sender of the message, to ascertain whether he was an impostor or not. Questions to attain that end, might easily be framed. As no inquiries on the subject were made, plaintiff might well suppose that the company did not desire more information than it had. By engaging in the business of transferring money by telegraph, between persons at a distance from each other, for which it charged large commissions, it took upon itself the responsibility of doing the service correctly, and like a banker who by mistake, pays a draft to some one who falsely personates the payee, or a carrier for hire, who delivers goods to one not the consignee, must make good the amount so lost. And if the company is not held to the duty of taking pains to ascertain the identity of the person to whom money transferred by telegraphic orders is to be paid, nothing would be easier than to use the telegraph as an instrument for committing frauds.

My brothers think that where there is nothing to create suspicion in the minds of the company's agents, it is for the party on whom the demand is made, to ascertain for himself whether he who makes it, is the person he professes to be, and that the company has no right to refuse payment of the

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money to him in reply to whose message, the order to pay it is sent. I was strongly inclined to the other conclusion. But the case is a new one, and I defer to their opinion.

The other questions made will probably not arise again.

Let the judgment of the City Court be reversed, and the cause be remanded.

Alabama Gold Life Insurance Company v. Mayes, Adm'r.

Action to Policy of Insurance.

1. *Contract of insurance; requisites of.*—In the absence of statutory prohibition, a contract of insurance may be made by parol, or there may be a parol agreement to insure, which a court of equity will enforce; but whether made by parol or writing, as in all other contracts, the mutual assent of the parties to all the elements and terms of the contract, is essential to its existence.

2. *Same; what does not constitute.*—B obtained from the agent of an insurance company,—who claimed to exercise no other power than to receive B's application of life insurance, the percentage of the premium and the fees for the policy, and note for the remainder of the premium, and forward the same for the rejection or acceptance of the insurance company,—a written instrument or receipt, reciting that B had made application for a policy of insurance on his life, for a given sum; the payment of a certain part of the first annual premium, &c., and B's note for the remainder. This instrument further states, that "B was to be considered insured from the date of the receipt, if said application shall be approved and accepted by said company, in which case a policy shall be issued to him, and this receipt surrendered; but if said application shall be rejected, then the amount named and the note given, shall be returned to B, and this receipt shall become null and void." This application was duly forwarded to the Insurance Company, which after a delay of several weeks, rejected the application, but did not give up the cash payment or note, no demand having been made for their return. B was taken sick about this time, and died a few weeks afterwards without being informed of the rejection of his application, and his administrator brought suit upon the receipt, as on a contract of insurance,—*held*:

1. The transaction constituted merely a proposal from B to the agent for a contract, the unqualified right of acceptance or rejection being reserved to the principal, and the proposal could not ripen into a contract, until accepted by the principal.

2. Mere delay of the Insurance Company in accepting the offer or proposal, and in returning the cash premium, for which demand was not made, did not amount to an acceptance of the proposal, and convert it into a contract.

3. The Insurance Company had the right to decline acceptance of the proposal without assigning any cause, no contract being made by the agent, who claimed no power to make any contract; and herein this case differs from those where an agent having authority to make contracts of insurance, makes one subject to approval of his principal,—as to which it is held the principal can not withhold his approval, without sufficient cause.

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4. The transaction until the proposal of B for life insurance was rejected was merely prereratory to or initiatory of a contract, and was terminated absolutely by the rejection of the proposal; no other duty remaining afterwards on the Insurance Company than to return, on demand, the cash paid by B, and the note given by him.

APPEAL from Mobile Circuit Court.

Tried before Hon. H. T. TOULMIN.

Appellee, Mayes, as the administrator of George Blakely, brought this action against the appellant, Alabama Gold Life Insurance Company, to recover the amount of a policy, alleged to have been issued by it on the life of his intestate. The facts material to the decision, are as follows: On the 3d day of December, 1869, plaintiff's intestate made application to the company for a policy on his life, through B. F. Smith, and on the same day paid to Smith one hundred and thirty-three dollars and sixty-six cents in gold coin, and gave him his note for eighty-four dollars and sixty-six cents, and Smith executed and delivered to him a receipt in the following words and figures:

"Amount	The Alabama	Premium
\$5,000.00.	Gold Life Insurance Co.,	\$211.80.
	Mobile, Ala.	

C. E. Thames,	Cary W. Butt,	T. N. Fowler,
President.	Vice-President.	Secretary.

"Received of George Blakely, of Boligee, county of Greene, State of Alabama, one hundred and thirty-three dollars and sixty-six cents in American gold coin, together with note for eighty-four 66-100 dollars, being the first annual premium, interest and policy fees, on an insurance on his life for five thousand dollars; for which an application is this day made by him to the Alabama Gold Life Insurance Company, located in the city of Mobile, Ala. The said George Blakely shall be considered as insured from the date of this receipt, if said application shall be approved and accepted by said company, in which case a policy shall be issued to him, and this receipt surrendered; but if said application should be rejected, then the amount named and the note given shall be returned to said George Blakely, and this receipt shall become null and void.

"Dated December 3, 1869.

B. F. SMITH,

"Gen. Agent Ala. Gold Life Ins. Co."

The agent claimed no other authority than to receive the application and premium, &c., to be forwarded to the Insurance Company.

On the sixth day of January, 1870, the draft of Blakely,

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for the cash payment mentioned in the receipt, was paid to the company, and on the 28th day of the same month, Blakely's application was delivered by Smith to the company. Upon that day Dr. Herndon, the medical examiner of the company to whom the application had been submitted, returned it to the proper officer of the company, and directed that a friend's certificate should be obtained, and the secretary on the same day wrote to Smith, requesting that a friend's certificate be sent. On the 28th day of March, 1870, a "friend's certificate," bearing date the 18th day of that month, was sent to the company, and on the first day of April, 1870, the risk was disapproved by the medical examiner, and on the sixth of that month was acted on by the committee of the company and rejected. On the same day, Fowler, secretary of the company, notified the agent, Smith, of the rejection of the application, and on the seventh, Smith notified Johnston, the local agent at the residence of Blakely, of the rejection. On the 13th of May, 1870, Blakely died, having been sick for about six weeks, and not having notice of his rejection.

After the death of Blakely, and on or about the 25th of August, 1870, Johnston called on the appellee as the administrator of Blakely, and gave him a draft drawn by Smith & McInnis on the company for the sum of one hundred and seventeen dollars and ninety-six cents, stating at the time that the draft was for the amount of a premium paid by deceased to the Insurance Company when he made his application, and that the application had been rejected. The appellee testified that he received the draft in ignorance of the amount paid the company by Blakely, and upon the representations of Johnston that the draft was for the full amount of the premium paid, and he surrendered to Johnston the receipt given Blakely by Smith, and sent the draft to Mobile for collection, where it was paid by the company. He testified that had he been informed of the facts, he would not have received the draft or surrendered the receipt, and that he acted on the statements of Johnston. It was not shown that the note given by Blakely had ever been returned, or in any way accounted for the appellant. Appellee ascertaining the facts to be as above stated, brought suit on the receipt, as on a policy of insurance. Numerous exceptions were reserved to the ruling of the court and to charges given and refused, but in the view which the court took of the case, it is unnecessary to refer further to them. The jury, (under instructions which held the company liable, unless it

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notified Blakely of the rejection of his application in a reasonable time, and returned to him the money and note, within a reasonable time, of which they were to judge,) found a verdict in favor of plaintiff for the amount of the policy and interest; and the company brings the case here by appeal.

BOYLES & OVERALL, for appellant.

R. H. & R. INGE, and G. L. SMITH, *contra*.

BRICKELL, C. J.—The errors assigned are numerous, relating to questions of pleading, rulings of the court below on the admission of evidence, and in giving and refusing instructions to the jury. It is not necessary to consider them separately, for in view of the evidence, there is a radical error in many of these rulings, and the appellee who was plaintiff has no right of recovery in any aspect of the case.

In the absence of statutory prohibition a contract of insurance may be made by parol, or there may be a parol agreement to insure which a court of equity will enforce.—*M. M. D. & M. Ins. Co. v. McMillan*, 31 Ala. 711; *Relief Fire Ins. Co. v. Shaw*, 4 Otto, 574; *Bliss on Life Ins.* 183, § 138; *May on Ins.* 13, § 14. Whether by parol, or in writing, as in all other contracts, the mutual assent of the parties to all the elements and terms of the contract, is essential to its existence. If the parties have not agreed on the subject of insurance, the limit and duration of the risk, the perils insured against, or the hazards insured, the rate of premium, and the amount to be paid in the event of a loss, or upon any other element or term which may be peculiar to the particular contract, whatever may have been the negotiations or propositions passing between them, these have not reached the form and obligation of an existing contract.

The contract of insurance may like other contracts be effected through an agent, and the existence of a contract complete in itself, often depends on the authority with which the agent is clothed. Whatever may have been the authority of the agent with whom the negotiations in the present case were conducted, he claimed to exercise, and exercised no other power, than to receive the application of the deceased, for a policy of insurance on his life, the percentage of the premium, and fees for a policy, and note for the remainder of the premium, to be forwarded to his principal, the appellant. If he had any other authority than to receive the ap-

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plication, and the premium, forwarding the application for acceptance or rejection by the principal, it was not exercised, nor was its exercise invoked by the deceased. The existence of a larger power is not therefore a material inquiry; it could not compel him, or his principal, into a contract he never made, or intended to make.

The application for insurance, was no more than a proposition from the deceased, to the appellant, to enter into a contract of insurance. It has not in it a word proceeding from the appellant. It was the act of, and proceeded from the deceased alone, and it remained his act, a mere proposition for a contract, until the appellant assented to it, and agreed to accept the risk on the terms stated.—*Hieman v. Phenix Mut. Ins. Co.* 17 Minn. 173; *Schwartz v. Germania Life Ins. Co.* 18 Minn. 448; *Wallingford v. Home Mut. Fire Ins. Co.* 36 Mo. 46; *Ins. Co. v. Young*, 22 Wall. 83; *Cotton States Life Ins. Co. v. Scurry*, 50 Geo. 48.

The receipt given by the agent to the deceased, at the time of receiving the application, indicates the real character of the transaction. Neither party then contemplated a contract complete in itself, or supposed there was more than a proposition for a contract. It is stated in express terms in this instrument, that the deceased has made an application for a policy of insurance on his life, for five thousand dollars, the payment of a certain part of the first annual premium, interest and policy fees, in cash, and the execution of the note of the deceased for the remainder of the premium. It is further stated, the deceased was to be considered insured from the date of the receipt, *if said application shall be approved and accepted by said company, in which case a policy shall be issued to him and this receipt surrendered; but if said application should be rejected, then the amount named, and the note given shall be returned to said George Blakely, and this receipt shall become null and void.*

The receipt discloses, as we have said, the true character of the transaction, a proposal for a contract to an agent, the agent reserving to his principal, from abundant caution, the absolute and unqualified right of acceptance or rejection. If the proposition was accepted, a policy, the highest and best evidence of the contract, was to follow the acceptance. The policy was to have relation to the date of the receipt, if the proposal was accepted, and this is the only element of contract, so far as the appellant is concerned, to be found in the transaction, and that depends upon the acceptance of the proposition. If it is not accepted, the receipt by its own

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terms becomes void. As a security for the return of the money which accompanied the application, it may remain after rejection, but for no other purpose.

The fact is undisputed, that appellant did not accept, but rejected the application. It is however insisted the rejection came too late—that the appellant was bound to accept or reject the application within a reasonable time, and if rejected, notify the deceased thereof, returning the money advanced by him, and his note. The delay of the appellant then, would take the place of the *assent* which is the essential ingredient of a contract. We are not aware of any authority for the proposition, that mere delay—mere inaction, can amount to an acceptance of a proposal to enter into a contract. The opposite, is the true doctrine, that if no answer is given to a proposition for a contract, within a reasonable time, the proposition is regarded as withdrawn. The principle is stated in *Hallock v. Conn. Ins. Co.* 41 Conn. 268: “A contract arises when an *overt act* is done, intended to signify an acceptance of a proposition, whether such overt act comes to the knowledge of the proposer or not, and unless a proposition is withdrawn, it is considered as pending until accepted or rejected, provided the answer is given in a reasonable time.”

If the appellant was dilatory in acting on the proposal, the deceased could have quickened its diligence, by demanding prompt action; or, if not assenting to the delay, he could have retracted his proposal, and reclaimed the money he had advanced and his note. He had no right, without an inquiry as to the cause, without any action on his part, to rely on the supineness of the appellant, no greater than his own, as an acceptance of the proposal.—*Ins. Co. v. Johnson*, 23 Penn. St. 72; *Bentley v. Columbia Ins. Co.* 17 N. Y. 421; *Flanders on Insurance*, 108.

It is also insisted, that the rejection of the application was without cause, and that though the proposition was subject to the approval of the appellant, yet the necessary implication is, that the approval would be given unless good cause existed for withholding it. There are authorities, holding, that if an agent is authorized to make contracts of insurance, and he makes a contract subject to the approval of the principal, that the principal can not without sufficient cause withhold his approval.—*Flanders on Insurance*, 10 7–8, citing *Ins. Co. v. Webster*, 6 Wall. 192; *Palm v. Medina Ins. Co.* 20 Ohio, 529; *Lightboy v. N. Am. Ins. Co.* 23 Wend. 18; *Perkins v. Wash. Ins. Co.* 4 Cowen, 645. A marked and

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distinguishing feature between those cases and the present, is, that there was no contract made by the agent, if he had authority to make any. The only power he exercised was that of receiving the application and premium, reserving to his principal the absolute, unqualified right of rejection, and distinctly stating the consequences of rejection, that the transaction between him and the deceased should be void. This reservation was vain, if the appellant could now be required to show cause for its rejection of the application. We adopt the language of the Supreme Court of the United States, in a similar case: "It was clearly within the power of the company, under the condition expressed, wholly to reject the application, without giving any reason; or to accept the proposition with such modifications of the term specified, and of the usual conditions of such policies, as it might see fit to prescribe. The entire subject was both affirmatively and negatively within its choice and discretion."—*Ins. Co. v. Young, supra*.

In view of all the facts the jury should have been instructed, that the appellant had not entered into any contract of insurance, or any agreement to insure the life of deceased; that the transaction, until the proposal of the deceased was rejected, was merely preparatory to, or initiatory of a contract, and was terminated absolutely by the rejection by the appellant of the proposal, imposing no duty or obligation on the appellant, other, than on demand, to return the money paid to its agent, and the note of the deceased.—*Real Estate Ins. Co. v. Roessle*, 1 Gray, 336.

The rulings of the Circuit Court, were inconsistent with these views, and the judgment is reversed and the cause remanded.

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Indictment for Murder.

1. *Judge; when disqualified.*—A judge related, within the fourth degree of affinity or consanguinity to the slain, is incompetent to try one charged with the murder.

2. *Constitution, article 6, section 18 of, construed.*—Such relationship, though not falling within the letter of section 540 of the Code, which disqualifies on account of relationship to the parties, is a "legal cause" at

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common law, and also under article 6, section 18 of the constitution, which renders the judge incompetent, and authorizes the prisoner and the solicitor to agree upon a special judge, and in default of such agreement, an appointment by the clerk.

APPEAL from Dallas Circuit Court.

Tried before JOHN P. TILLMAN, Esq., an attorney of the court.

The appellant, Joe Gill, was indicted for the murder of William G. Gill. When the defendant was brought up for arraignment, the presiding judge being a first cousin of the person slain, declined to preside in the case, and the defendant and the solicitor failing to agree upon a special judge, the clerk appointed John P. Tillman, esq., a disinterested person, practicing in the court, and learned in the law, to preside as special judge.

The prisoner was then arraigned, and refusing to plead, the plea of not guilty was entered for him. A trial was had, the jury returning a verdict of guilty of murder in the second degree, and assessing the punishment at twenty-five years imprisonment in the penitentiary. The prisoner being interrogated if he had anything to say why the sentence of the law should not be passed upon him, "objected thereto, on the ground that the proceedings in the cause were informal and illegal, and did not authorize the court to pronounce judgment against him. The court overruled defendant's said objection, and he excepted, and defendant saying nothing further," the court passed sentence in accordance with the verdict. The defendant appealed.

It is now assigned as error, that there was no authority of law to appoint a special judge.

SUMTER LEA, for appellant.

H. C. TOMPKINS, Attorney-General, *contra*.

STONE, J.—The constitution, article 6, section 18, ordains that "If in any case, civil or criminal, pending in any circuit, chancery or city court in this State, the presiding judge or chancellor shall, for any legal cause, be incompetent to try, hear, or render judgment in such cause, the parties or their attorneys of record, if it be a civil case, or the solicitor or other prosecuting officer, and the defendant or defendants, if it be a criminal case, may agree upon some disinterested person practicing in the court and learned in the law, to act as special judge or chancellor, to sit as a court,

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and to hear, decide and render judgment in the same manner and to the same effect as a judge of the Circuit or City Court or chancellor sitting as a court might do in such case." The section then provides that in case the parties do not agree on a special judge to try the cause, "the clerk of the Circuit or City Court, or register in chancery, of the court in which said cause is pending, shall appoint the special judge or chancellor, who shall preside, try and render judgment as in this section provided." The record in this case recites that it was "shown that the Hon. George H. Craig, the presiding judge of the court, was related to William G. Gill, the person who is charged to have been murdered by the defendant, within the fourth degree of consanguinity, to-wit, was his first cousin; the said judge by reason of his relationship declined to preside on the trial of said Joe Gill, and the defendant and the solicitor for the State having failed to agree upon a special judge to sit as a court, and to hear and decide and to render judgment in this cause, the clerk of the court thereupon appointed John P. Tillman, a disinterested person practicing in this court and learned in the law, to sit as a court, to preside, try, hear and decide, and render judgment herein, in the same manner and to the same effect, as the presiding judge of this court, sitting as a court, might do, sitting in this cause." The said John P. Tillman did preside as judge on the trial of this cause, and defendant was convicted of murder in the second degree. It is objected that there "was no authority of law to appoint a special judge." This is the only question raised by the record, which we consider it necessary to notice.

The Code of 1876, section 540, declares that "no judge of any court, chancellor, county commissioner, or justice, must sit in any cause or proceeding in which he is interested, or related to either party within the fourth degree of consanguinity or affinity, or in which he has been of counsel, without the consent of parties entered of record, or put in writing, if the court is not of record." The parties to the present proceeding were the State of Alabama as complaining party, and Joe Gill as defendant. These were the only parties. It is manifest that the present case does not fall within the letter of the statute. But, if we confine the rule to the strict letter of section 540 of the Code, we thereby declare a judge may sit in judgment on a criminal, who took the life of his nearest relative. Nay, more; for offenses less than homicide, we declare that a judge may try an offender for a public offense against his own person or property.

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According to the stern morality of the common law, a judge is required to be legally indifferent between the parties. Any, the slightest pecuniary interest in the result, disqualifies. Relationship, usually within the fourth degree of the civil law, the law in its severe, but humane ethics, regards as a bias that unsettles the perfect equipoise that justice demands.—See 2 Bouv. Bacon, Courts, letters L. and M. pp. 620, 621; 4 Vin. Abr. Chancery, letter L. p. 385; Earl of Derby's Case, 12 Rep. 114; *Hawkins v. Co. of Kennebeck*, 7 Mass. 461; *Dimes v. Gr. Junction Canal Co.* 16 Eng. L. & Eq. 63. In Freeman on Judgments, section 145, it is said to be "well settled by the common law that no judge ought to act where, from interest or from any other cause, he is supposed to be partial to one of the suitors." In *Moses v. Julian*, 45 N. H. 52, may be found a most elaborate collection of authorities on this question. The student of this interesting question will find much valuable information by consulting that case. The question has also been before this court.—See *Claunch v. Castleberry*, 23 Ala. 85; *Heydenfeldt v. Towns*, 27 Ala. 423, 430.

We hold that Judge Craig did not err in declining to preside in the trial of this case, and that he was incompetent to preside, in consequence of his relationship in the fourth degree to the deceased. This was a "legal cause" under our constitution which rendered him incompetent to try, hear, or render judgment, and presented a case, precisely within its provisions, for the appointment of a special judge.

Affirmed.

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Indictment for Larceny of Hog.

1. *Arrest of judgment; what not ground of motion for.*—It is not ground of motion in arrest of judgment, on a general verdict of guilty upon an indictment in the Code form, not specifying the particular time of the commission of the offense,—that it is not affirmatively shown by the record, whether the conviction was for an act committed before or after the passage of a statute, which punished as a felony, an act which before was only a misdemeanor; it must be presumed, in the absence of a bill of exceptions showing the contrary, that the judgment which the evidence demanded was rendered.

2. *Indictment for grand larceny; what sufficient.*—An indictment for larceny of a hog, not alleging any value, can be upheld only under the act of

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February 20th, 1875, which makes the stealing of such an animal a felony, without regard to value; and a general verdict of guilty on such an indictment authorizes sentence for grand larceny.

3. *Excessive penalties, under law authorizing working of prisoners for cost.*—The court adverts to the excessive penalties which some times arise under the law authorizing offenders to be put to work for payment of costs of conviction, at the rate of not exceeding forty cents per day, and expresses the hope that the matter will undergo early legislative correction.

APPEAL from the Circuit Court of Wilcox.

Tried before Hon. JOHN K. HENRY.

The indictment in this case, returned at the fall term, 1876, charged that “before the finding thereof, Abe McDowell feloniously took and carried away a hog, the personal property of George Richards, against the peace,” &c. The jury found the defendant “guilty as charged in the indictment,” and assessed the value of the stolen property at one dollar.

The defendant moved in arrest of judgment, on the grounds stated in the opinion. The motion was overruled, and defendant excepted. The court sentenced the defendant to two years hard labor for the county, and also “to perform additional hard labor for the county, for the additional time of fifteen hundred and seventy-five days, to pay the sum of three hundred and fifteen dollars and thirty cents, the costs and officers’ fees, and the value of the property.”

BRUTUS HOWARD, for appellant.

H. C. TOMPKINS, Attorney-General, *contra*.

MANNING, J.—An indictment preferred at the fall term, 1876, of Wilcox Circuit Court, against appellant, charged “that *before the finding of this indictment*, Abe McDowell feloniously took and carried away a hog, the personal property of George Richards,” &c. The verdict thereupon was “guilty as charged in the indictment.” A motion was made in arrest of judgment on the ground that it did not appear and the court could not know, by inspection of the indictment and verdict, whether the conviction was for an act committed before or after the statute of February 20th, 1875, went into operation; which statute changed the law previously existing and made the offense charged, grand larceny, without regard to the value of the animal stolen, which the jury assessed at one dollar.

The argument ably pressed for defendant, is, in substance, this: That in a case of this sort, a prosecution begun after a change of the law, whereby that was made grand larceny,

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which was previously petit larceny only, time is "a material ingredient of the offense," and should have been alleged in the indictment; because otherwise it would not appear by the record whether the offense of which defendant was found guilty, was committed before or after the enactment of the new law, or, consequently, whether it was grand larceny or petit larceny; and that in this uncertainty the court could not pronounce a sentence for either.

In their endeavor to prevent in the practice of this State, the excessive verbosity of the old indictments, our law-givers have prescribed forms the brevity of which in some cases we have had occasion to regret. But we are not at liberty to disregard them. Our statutes expressly provide that where time is not "a material ingredient of the offense," it is sufficient to charge generally that the offense was committed "before the finding of the indictment."—Code of 1876, § 4788 (4115). This clause, "before the finding of this indictment," is itself however mere surplusage or would be so, if not prescribed by statute. For of course, the offense charged must in the nature of things, if committed at all, have been committed before the grand jury could by the indictment have reported it. The accusation necessarily imports that the thing charged had been theretofore done. So that with or without that addition, it comprehends all past time as that within which the act was committed. It therefore goes back not only beyond the bar of any act of limitation, but beyond also the enactment of any statute defining the offense and prescribing the penalty. As was said by WALKER, C. J., in *Molette v. The State*, (33 Ala. 408): "Before the Code, this would have been a fatal objection; but it is not now necessary to make any averment that the indictable act was done within the time mentioned in the act of limitations. No specification of the time is necessary, unless time is a material ingredient of the offense."—See, also, *McGuire v. The State*, 37 Ala. 161; *Noles v. The State*, 24 Ala. 694. Although, however, as was held in the first of these cases, the time when an offense was committed, need not be alleged in the indictment, it must be proved on the trial that it was committed within the period, which is prescribed as a bar against the prosecution for it. If this is not done, the prosecution fails. Why? Because when the period of limitation elapsed, the act ceased to be a punishable offense. No court was then authorized to pronounce sentence against the person who committed it. And presuming that every court having jurisdiction acts according to its duty in such a case,—the

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law considers its judgment as properly rendered upon the just verdict of a jury to whom the requisite evidence had been submitted with proper instructions,—unless the contrary be shown by a bill of exceptions.

In like manner, if there be a contention whether the act for which a defendant is on trial, was a punishable offense,—not for the reason that the statute of limitations was a bar,—but because the statute by which such an act was subsequently made a punishable offense was not then in force, it must be presumed unless the contrary be shown, that a court proceeding upon an indictment in the form prescribed by the Code, and as applicable in the one case as in the other, has acted in accordance with its duty, and rendered a correct judgment upon a verdict justified by the evidence and the law, and therefore that the act was committed in violation of an existing law. True, there being no time specified, it would not be affirmatively shown in either instance by the indictment or the verdict, (a mere response of “guilty as charged in the indictment,”)—that the act for which sentence was passed, was not committed at a time, beyond the period which would bar a prosecution for it, or when no law existed which made the act an offense. The logical mind, therefore, naturally objects that this is a defective foundation for a judgment against the defendant. The record by itself does not vindicate the sentence. This is a consequence, however, of the forms of indictment prescribed by our law-givers, and is no more objectionable in one of the cases we have referred to than the other.—See *Henback v. The State*, 53 Ala. 523.

What is meant by the expression in the Code—“unless time is a material ingredient of the offense?” If the law—or the time of enacting a law—were, as counsel seem to think, a material ingredient of the offense, within the meaning of the Code, in this case, it would be so in every other. For without a law against an act, it would not be an offense in the sense of being punishable by the courts. We think the ingredient meant, is an ingredient of the act committed, something that gives to it an evil character or effect, which causes the law to denounce it. Thus time is an ingredient of Sabbath breaking,—was an ingredient, (night-time,) of burglary at the common law, and may be in offenses relating to elections and other matters. Certainly since it is not necessary to allege that the act for which a prosecution is set on foot, was committed within the time which would bar it, it can not be necessary to allege, although it be to prove, that it was done after the law making it an offense, or an offense of a higher

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degree, was enacted. In the instance of a new law especially, more even than in one in which the statute of limitations might be involved,—a conscientious judge of the Circuit Court would feel compelled to instruct the jury, in a proper case, that if the act was not proved to have been committed after the time, designated by him, when the law went into effect, they must find the defendant not guilty. And as we have before said, under the law as now prescribed to us by the legislature, we must presume that this was properly done, unless by exceptions defendant shall show that it was not. The fact that his counsel did not undertake to do this, leaves no room for doubt that he was guilty as found by the jury.

The ruling in *McIntyre v. State*, 55 Ala. 167, is on a peculiar statute relating to revenue, which provided that the license it requires a photographer to obtain need not be taken out before a certain specified day in each year; a credit for it being thus allowed in the meantime. And it is intimated in the opinion in that cause that the decision was not to be regarded as constituting a rule for other cases variant from that.

The indictment before us was evidently preferred under the act of 1875. It was only under it that such an indictment could be sustained, if it did not allege a value in the article stolen. That allegation was required by the forms in the Revised Code as well as by the common law in an indictment for either grand or petit larceny. But the statute of 1875 makes this unnecessary, *Gregg v. State*, 55 Ala. 116, when the prosecution is for the stealing of a domestic animal of the kind mentioned in it, an offense which is made grand larceny without regard to value. The purpose of the act was to prevent a crime which had become so prevalent and pernicious as, in a large degree, to put an end to the raising of such animals as a part of the business of planters and farmers in this State. To support this indictment, therefore, it must have been proved that the offense which it charged was committed after the enactment of that statute.

There is a part of the judgment in this cause that we wish we could reverse or greatly reduce. Following the decisions of our predecessors in *Nelson v. State*, (46 Ala. 186, opinion by PETERS, J.,) and *Morgan v. State*, (47 Ala. 34, opinion by PECK, C. J.,) we have held that the statute authorizing convicted offenders to be condemned to work for the counties, respectively, for the payment of costs, at not exceeding forty cents a day, was a valid enactment.—*Caldwell v. State*, 55 Ala. 133; *Walker v. State*, 58 Ala. 395. And we can not

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say we think these decisions are erroneous. But the results, unforeseen we are sure, which the law may produce in cases like the present where the costs amount to a large sum, are so excessive and unjust, that we hope the whole subject will undergo legislative correction, at the next session of the General Assembly. And unless there be peculiar reasons to the contrary, not shown by the record, a very large part of the penalty imposed in consequence of the non-payment of the costs in this case, ought we think in due time to be remitted. In *Caldwell v. State*, *supra*, we said: "Such additional punishment is, doubtless, as much within the pardoning power of the Governor, as any other part of the sentence pronounced on a convicted offender."—55 Ala. p. 135.

Let the judgment of the Circuit Court be affirmed.

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Indictment for setting up, or being concerned in setting up or carrying on a Lottery.

1. "*Tuskaloosa Scientific and Art Association*," charter of; does not authorize lottery.—The charter of the "*Tuskaloosa Scientific and Art Association*," &c., approved February 3d, 1866, construed, and the conclusion declared that it does not authorize a lottery on the numerical or combination plan; or on any other plan where money or its equivalent is offered or distributed as premiums.

APPEAL from City Court of Mobile.

Tried before Hon. O. J. SEMMES.

The appellant, Boyd, was indicted and convicted under section 4445 of the Code, for setting up or being concerned in setting up or carrying on a lottery, &c.

On the trial, a bill of exceptions was reserved, which sets forth all the evidence. The evidence on the part of the State tended to show that "an association known as the '*Tuskaloosa Scientific and Art Association*,' had its office in the city and county of Mobile, and that within twelve months next preceding the finding of the indictment, said association disposed of certificates of subscription in Mobile county, and proceeded to distribute awards in the following manner, amongst the holders of said certificates." These certificates were of four kinds, being sold respectively for

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ten, twenty-five and fifty cents. The ten cent certificates were in the following form :

“ Fractional Certificate of Subscription
 A. to the A.
 Tuscaloosa Scientific and Art Association,
 Incorporated by the Legislature of Alabama,
 Feb’y 3d, 1866.

Certificate —, Number —, Class —.
 Amount subscribed 10 cents. Value of Award 50 cents.

The holder of this Fractional Certificate of subscription, if the number it bears corresponds with any of those cast by lot in this class, is thereby entitled to any one of the following awards, as set forth and published, with their value annexed, to-wit:

A photograph of a distinguished person, of the value of 50 cents.

A photograph illustration of Gustave Dore, of the value of 40 cents.

A coupon of the U. S. four per cent. bonds, of the value of 50 cents.

A copy of Davies’ Arithmetic, of the value of 50 cents.

No commutation of money allowed, unless exacted in strict accordance with section 7 of the charter, and the holder of this certificate must designate the particular award he selects, which award may be delivered him by the agent in kind, or by an order on the Central office.

W. W. BOYD, Jr., Treasurer.

Series 1878. Recorded in presence of subscriber by _____, Agent.”

The other certificates were similar to the above, the awards consisting of chromos, sets of china, bound copies of Scientific American, and coupons, gold watches, and books on scientific subjects. The bill of exceptions recites that, “any person may obtain certificates of subscription on paying therefor according to the rate fixed for each class and selecting the number or numbers which such certificate is to bear—from 1 to 78; that, at certain stated times, due notice of which is given by public advertisements, there is a distribution of awards amongst the holders of certificates, consisting of such articles in kind as may be allotted by chance or lot to any of the certificates of subscription disposed of by the association and designated in advance by the holders of said certificates; that the said distribution of awards is conducted as follows: 78 numbers printed on slips of paper are

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severally encased in tubes, concealing the number they bear; these are put in a wheel and, after some revolutions, a blind-folded person takes a number out, passes it to some other person who reads it aloud and records it; then, other numbers are severally taken out—eleven or twelve in all—and opened and read in the same manner. And any certificate which bears any number or numbers corresponding with any of those drawn by lot or chance as before described, becomes entitled to the award set forth on said certificate, as designated in advance by the holder, out of those contained in the published list; and if none of the numbers of a certificate corresponds with those cast by lot, then the said certificate receives no award. The State further introduced evidence to show that a large majority of the holders of certificates selected in advance awards consisting of unmatured bonds and unmatured coupons of the United States' debt; that only a few comparatively, say—one hundred or more—selected pictures, illustrations, books or other useful or ornamental articles in kind; but that *no money* was paid out as awards by the association in any case; that the bonds or coupons, when distributed, were handed to the persons entitled to them in a small envelope, and that they consisted invariably of unmatured public obligations; that these, however, could be disposed of by the holder as he chose, and that brokers and banks are always ready to buy them; and the State showed that several persons had bought those bonds and coupons, when offered for sale; it was further shown that many persons had been allowed awards at those distributions, and that on no occasion had it occurred that none of the articles advertised for distribution had been awarded; it was also shown that there were sometimes two and sometimes three distributions of awards daily. It was also shown that the defendant was a stockholder of the association for some shares of the value stated in the charter of incorporation, and that he was one of the charter officers of said corporation, to-wit: its treasurer."

The defendant's evidence tended to show that, whatever was done as above stated, in and about the said distribution of awards amongst the holders of certificates, was done under the following charter of incorporation, entitled "An act to incorporate the Tuskaloosa Scientific and Art Association for the purpose of encouraging science and art, and in aiding the University in replacing its library, and establishing a scientific museum," approved February 3d, 1866.

"Section 1. Be it enacted by the Senate and House of

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Representatives of the State of Alabama in General Assembly convened, that Hampton S. Whitfield and William H. Fowler, and their associates and successors, be and they are hereby created a body corporate of the name and style of the Tuscaloosa Scientific and Art Association, for the purpose of the encouragement of art and science in the distribution of works of art, and to aid the University of Alabama in replacing its library and establishing a scientific museum.

"Sec. 2. Be it further enacted, that the said corporation shall have the power to purchase and hold, sell, transfer and confer such real and personal property as may be necessary for its purposes, to make contracts, and to sue and be sued in any court of law or equity in the State, by its corporate name, and may have and use a common seal, which can be altered or abolished at pleasure.

"Sec. 3. Be it further enacted, that the capital stock of said corporation shall be ten thousand dollars, and may be increased to fifty thousand dollars if the business of the corporation shall justify such increase, and the same shall be divided into shares of one hundred dollars, to be called in at such times and in such amounts as the corporation may upon due notice give and direct, and may be transferred by assignment on the books of the corporation; and each share shall entitle the owner thereof to one vote in the business direction of the corporation, in person or by proxy, in accordance with the by-laws of said corporation, and each stockholder shall be individually liable to the creditors and beneficiaries of said corporation to the extent of his or her stock.

"Sec. 4. Be it further enacted, that the books of subscription to the capital stock of said corporation shall be opened by the corporators above named at a convenient time and place, to be fixed by them after ten days notice thereof, and when the sum of ten thousand dollars is subscribed, said books may be closed, and the corporation may thereupon organize itself by the election of a president, vice-president, secretary and treasurer, who shall hold their offices for one year, and until their successors are elected; and the said officers shall constitute the board of directors of said corporation, and shall manage and control its business under such restrictions, resolutions and by-laws as the stockholders may make.

"Sec. 5. Be it further enacted, that the stockholders shall hold annual meetings at such time and place as they may determine, and may have called meetings upon due notice given by the president or three stockholders, as the by-laws

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may direct, and at said annual meetings the officers of the corporation shall be elected, and a record of the proceedings of all meetings shall be kept, subject to the inspection of every stockholder; and if any stockholder shall fail to pay his stock upon call as herein provided, he may be sued for the same in any court having jurisdiction.

"Sec. 6. Be it further enacted, that the said corporation shall have the power to receive subscriptions and to sell and dispose of certificates of subscription, which shall entitle the holders thereof to any articles that may be awarded to them; and the distribution of awards shall be fairly made in public, after advertisement, by the casting of lots, or by lot, chance, or otherwise, in such manner as shall be directed by the by-laws of said corporation, and shall be made at its office at Tuscaloosa, or at any other convenient place in the State that may be selected by the corporation, and the said distribution of awards may be made at any time and as often as the corporation may deem necessary; Provided, that before any distribution is made, they shall advertise in a newspaper, or by some other method, a list of all the articles to be awarded at the distribution, and the value of each, and all in money, annexed; and the said corporation shall have the power to offer premiums or prizes, in money, to the best essays on science and art, written by citizens of Alabama, or to the most deserving works of art, executed by citizens of Alabama, or to the most useful inventions in mechanics, science or art, made by citizens of Alabama.

"Sec. 7. Be it further enacted, that the articles to be distributed or awarded may consist of books, paintings, statues, antiques, scientific instruments or apparatus, or any other property or thing that may be ornamental, valuable or useful, and, to prevent fraud or unfair speculation, any holder of a certificate, if he has cause to believe that the article or premium awarded to him is not worth the value annexed to it in the published list, may have the same appraised by two or more disinterested persons, and if it be decided by them that the article is not worth its annexed value as published, they shall appraise the same at a fair market value, and then the holder of said certificate, instead of the article in question, may demand its annexed value in money, or he may demand the article and so much money in addition thereto as will equalize its appraised value with its published value in the list; and he may enforce his right herein, if contested, by a motion after ten days notice for judgment and ten per cent. damages against the corporation in any court having jurisdiction.

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"Sec. 8. Be it further enacted, that an account of the net proceeds of the business be kept in suitable books, and that a dividend of not more than fifteen per cent. of which shall be paid over to the stockholders, and the balance into the treasury of the University in annual payments, and that the board of trustees of the University shall have the power to appoint at each annual meeting a committee of three of its members to inspect the said books and report to the said meeting.

"Sec. 9. Be it further enacted, that if the said corporation shall fail to pay over to the treasurer of the University, upon demand, any money due by the provisions of the preceding clause, the board of trustees of the University may at its next ensuing term of the Circuit Court of Tuscaloosa county enter a motion after ten days notice, for judgment for the amount due and ten per cent. damages against the corporation.

"Sec. 10. Be it further enacted, that this act of incorporation shall continue and be in force for the space of twenty-five years from the date of its passage, and that all laws and parts of laws in conflict with its provisions, be *pro tanto* repealed."

The defendant further showed that the incorporators of said association, a short time after the approval of this act of incorporation aforesaid, organized as provided in said act by the opening of subscription books, the election of officers, and that said organization has ever since always kept up its organization down to and at the time of the acts aforesaid.

"The defendant further proved that said association, although its capital has been absorbed in losses, has, however, paid out large sums of money towards the objects of its formation, namely, exceeding eleven thousand dollars divided between the State University, the Medical College of Mobile, the State Agricultural and Industrial Fair, the public schools of Mobile, Selma, and other points, and other learned and educational institutions, the whole being for the encouragement of arts, sciences, &c., &c. The defendant further showed that, before each and any distribution of awards took place, the association caused to be published in a conspicuous manner, in various public places of the city of Mobile and in its several offices, a complete, detailed list of all the several articles of ornament, use or value, which were to be awarded to such certificates as became entitled thereto by the casting of lots, together with the value of each, all in money annexed, and from amongst which articles the holder

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of each certificate had designated in advance the article he selected, in case his certificate should become entitled to any award in the class to which it belonged."

The defendant also introduced in evidence the rules of the association. In the view which the court took of the case, it is not material to notice these further than to say, that they were in the main directed to cautioning the agents to a strict compliance with the charter, and providing penalties for disobedience.

"The defendant further showed that the distribution of awards were fairly made, in public and after such advertisements as above described, and that said distributions were made by the *casting of lots*, or by lot, or chance, *in the manner provided by the by-laws of the association*, of which due proof was made by the production of the original minutes of the association, and that the objects distributed were either ornamental, valuable or useful, including U. S. bonds and coupons. This was all the evidence."

The court charged the jury, that "this is an indictment against the defendant, charging him with setting up or being concerned in setting up or carrying on a lottery. If you believe from the evidence, beyond a reasonable doubt, that the defendant engaged in or was concerned in selling pieces of paper with certain numbers thereon; that corresponding numbers were put into a glass wheel and a certain number of said numbers drawn from said wheel, one at a time by chance, and the person who bought the said pieces of paper got something of value or nothing, according as the numbers on his piece of paper so bought are amongst the numbers drawn from the wheel or not—and further, that the defendant gains or loses according as the number of persons winning is greater or less—then he would be guilty as charged in the indictment, and would not be protected by the act of the legislature entitled, 'An act to incorporate the Tuskaloosa Scientific and Art Association, for the purpose,' &c., provided, you further find from the evidence, beyond a reasonable doubt that it was done in Mobile county before the finding of the indictment and within twelve months thereof, in which event the form of your verdict would be," &c. The defendant duly excepted to this charge.

After the jury had been out for some time, they asked to come before the court, which was allowed, and they asked further instructions on the following question: "Was the charter of the Tuskaloosa Scientific and Art Association in full force and effect at and previous to the time when the

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indictment was found? Whereupon the court, after reading the question, allowed that this was a very difficult question, but the court instructed them that the said charter was in force and effect at the time mentioned; but not for the purpose of running such a lottery as the court had described in its charge." The defendant excepted to this charge also, and then separately requested the court in writing to give the following charges:

"1. If the jury believe from the evidence that defendant was acting as the agent or manager of the Tuskaloosa Scientific and Art Association in the matters shown by the evidence, and that the plan or mode referred to in the certificate given in evidence and, as shown by the evidence, was so conducted as to entitle the holder thereof to any of the articles advertised to be awarded at the distribution under said scheme that might be awarded to it; Provided, the articles subject to distribution under the award were useful, &c., and that the distribution of awards was fairly made, in public, by the casting of lots, or by lot, chance or otherwise, in such a manner as was directed by the by-laws of the association; and, provided also, that such award was made after a list of all the articles to be awarded at the distribution had been advertised, with the value of each and all in money annexed, then, the defendant ought not to be found guilty.

"If the jury believe from the evidence that the plan or mode of carrying on its business by the Tuskaloosa Association, in the case shown by the evidence, was such that a holder of a certificate of subscription thereto or the holder of a ticket known as such certificate, had a fair chance thereby to have awarded to him, by the *casting of lots, or by lot, chance or otherwise*, in such manner as was directed by the by-laws of said association in evidence, any of the articles subject to distribution in the class designated by such certificate and of the articles mentioned in section 6 of the charter, as shown by the evidence—and that such award was fairly made, in public, after a reasonable advertisement of all the articles to be awarded at the distribution, with the value of each and all in money annexed thereto—such a scheme or mode of conducting its business was authorized by the charter—and if they further believe that the defendant conducted or managed such scheme as the agent of the association and according to its by-laws, he is not guilty.

"3. That the jury must believe beyond all reasonable doubt and to a moral certainty that the defendant set up or

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was interested in setting up or carrying on an unauthorized lottery, or they must acquit; and if, under the charge of the court, they have a reasonable doubt as to whether such lottery was authorized by law or not, they must acquit."

The court refused these several charges, and the defendant separately and duly excepted.

H. ST. PAUL, and JOHN LITTLE SMITH, for appellant.—The Tuscaloosa Scientific and Art Association is authorized to adopt and put in force any scheme by which the certificate holder may have a fair chance to have awarded or allotted to him by the casting of lots, or by lot, chance, or otherwise, in such manner as shall be directed by the by-laws of said association, any of the articles subject to distribution according to his certificate; provided such award or allotment be fairly made in the public after such an advertisement as is required by the sixth section of the charter, of the articles subject to distribution, by such casting of lots, or by lot, chance, or other mode mentioned, with the value of each article in money annexed.

In arriving at the meaning and intention of the legislature, certain well established rules of interpretation must be observed. The first great cardinal rule is: If the language of an act is plain, that language expresses the intention of the legislature. There is no room for conjecture.—9 Porter, 266; Potter's Dwariss on Const. Statutes, p. 143 § 2; p. 126, § 145.

It is not admissible to resort to conjecture or surmise of intention, and then from arguments of impolicy or hardships or consequences argue up to the conjecture or surmise, away from an intention clearly expressed in language when taken in its most usual, natural and obvious sense or import. The legal rules of construction do not admit of this.—Potter's Dwariss on Const. Statutes, &c., pages 143–4, § 9; 126, § 1; 145–6, §§ 19 and 20; 110, 117, 135, 181, 182, 192, 193, 196, 199, 203, 207; Sedg'k Stat. and Const. Law, pp. 260, 242, 243, 246. Not only the natural sense of the words must be adopted when the sense is clearly expressed, but when this is doubtful, statutes must be so construed as to give effect to every clause, and not so as to place one portion in antagonism to another.—*Brooks v. Mobile School Commissioners*, 31 Ala. 227.

When a power is given by a statute, by implication all is given which is necessary to the making of the power effectual.

2. When the act conferring the power under discussion

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was passed, there were two existing facts which stand out prominently in the construction of the act. One of these is, that it was unlawful to carry on, or to be concerned in carrying on, a lottery or a device of a like kind, unless special authority to do so was given.

The other is, that the buildings, apparatus and library of the State of Alabama had been destroyed; the resources of the State had been crippled, and it greatly desired to replace its lost library.

The State was somewhat in a similar condition as to means, as it was in during its earliest history. It was natural it should recur to the legislation of that period, and in it, they found lotteries a most common device for the building of schools and academies.

It is apparent from the act, that the legislature intended to confer an authority on the association to carry on some sort of a device, which it would not have been lawful to carry on without such authority, and such a device is in the nature of a lottery; also that the power given was a special one, which was intended to take them, as an exception, out from such general law, and to permit the association to do some *prohibited* act; that is, to carry on some sort of an otherwise prohibited lottery, or like device.

It is manifest that the chief motive of the legislature in granting this exceptional power, was "to aid the University of the State in replacing its library and establishing a scientific museum."

The *mode* and *particular means*, by which to effect this *great purpose* of replacing the University library and museum, are not limited, except as shown by sections six and seven. This purpose required money, and a large outlay of it. And money therefor the legislature designed to raise by the act. It expressly declares so in sections eight and nine of the act. These sections demonstrate that the legislature was earnestly intent on that purpose, and on securing the money to be raised.

A library, &c., was a necessity to the University. The declaration of the purpose to replace it shows the State's solicitude upon the subject. But the replacing of it was a matter of money, as stated, and the sooner the money could be raised upon a plan, which did not sanction an actual direct *money* lottery, the more speedily would the object be accomplished.

It is therefore natural that the legislature should have granted liberal provisions for the raising of money, and we

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should not be surprised to find such in an act, which appropriates to the declared purpose, *all* the earnings of the scheme *over and above fifteen per cent.*, and which virtually makes the corporators managers for the use of the University, at a compensation not exceeding such fifteen per cent. of the net proceeds of the business. All this is plainly seen by the sections quoted.

Section eight provides, as we have seen, that an account of the net earnings shall be kept in suitable books; that no more than *fifteen per cent.* thereof shall be paid to the stockholders; that all over that sum shall be paid annually into the treasury of the University; and the trustees of the University are authorized to appoint a committee, annually, to inspect such books, and report to the trustees.

And section nine provides, that if the association fails, on demand, to pay over any money so due, judgment therefor may be rendered in favor of said trustees against *the corporation* at the next ensuing term of the Circuit Court of Tuscaloosa county, *on ten days notice*, for the amount due *and ten per cent. damages thereon.*

And with this great object in view, and with the foregoing stringent provisions, we repeat we should be prepared to expect a very liberal grant of powers for the arrangement of a scheme which would furnish the corporation large chances for making money, wherewith to accomplish this great purpose of the act.

This scheme may not have accomplished the object that was in view; but success or failure can not be considered in determining the existence or non-existence of the motive and intention, nor the meaning of the act. Failure would only prove that the legislature was not wise in adapting its means so as to accomplish its ends. Such is often the case.

If such was the declared object, and such was the intention of the legislature, the language of the act must be interpreted so as to execute that intention, if it is susceptible of a reasonable construction consistent with such object and intention; for the construction should not place sections six and seven in antagonism to sections one, eight and nine, and to the title of the act.—*Brooks v. Mobile School Commissioners*, 31 Ala. 229; 9 Port. 266.

By the light of the intention indicated; the purpose declared, and the fact that the act under consideration is manifestly an exception to the law against lotteries in general, and confers some authority prohibited by such general law, let us enter upon the consideration of sections six and seven of the act.

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The first provision of section six confers power on the corporation to receive certificates of subscription, and also to sell and dispose of them. The corporation does this. It distributes property which belongs to it. It *sells chances* in its scheme of distribution.

What does this certificate entitle the holder to? The statute answers: "To *any* article that *may* be awarded to them." Not to *some* article which *must* be distributed to them. This last reading not only substitutes the word "*must*" for the word "*may*," but it also substitutes the word "*some*" for the word "*any*," and causes the sentence of the act under consideration to be changed so as to read as stated, viz: "To *some* articles that *must* be awarded them," instead of *any* articles that *may* be awarded to them, by *chance*, &c., or that *chance may happen to award to them*. The word *may* is not mandatory. It is not equivalent to *must*. In its ordinary sense the word *may* implies possibility.

In Webster's Dictionary, "*may*" is thus defined: "To be possible. We say a thing *may* be, or *may* not be; an event *may* happen; a thing *may* be done, if means are not wanting," &c.

Even *in statutes*, when the word *may* is used in connection with the exercise of a power, or the performance of a duty, it is a word of permission, except when the public interests are concerned, *and the public or third persons have a claim "de jure" that the power shall be exercised*.

This exceptionable construction or meaning of *may* is not the controlling rule in *ascertaining the purpose* of the legislature *as to the conferring of a right*.

In order to determine therefore whether a right is bestowed on the holder of a certificate to have some article of those subject to distribution, we must resort to the usual rules for the interpretation of statutes and give to *may* its usual significance.—*Ex parte Banks*, 28 Ala. 35.

The definition quoted from Webster, shows that the word *may*, is one of condition or possibility, dependent upon some other event. The grammars convey the same idea of possibility.

Therefore if the act had not sedulously defined that the word *may* should be taken in its usual sense, implying possibility and doubt, the most obvious sense of the words in the sentence under consideration would require us to read it thus: "Such certificates shall entitle the holders thereof to any articles that *may* chance to be awarded to them." But

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to avoid all question on the subject the next sentence so declares.

The possibility then is, that *something* may perchance be *awarded* to the holders, and of course that something *may not* be awarded to them.

It will be observed that the sentence speaks of holders, in the plural number, so that the possibilities should be put thus: That something may be awarded to the various holders, or that nothing may be awarded to them according to the result of lot or chance.

To escape from this reading then, something else must be found in the act which will prevent such a reading of the sentence. We propose to show that there is nothing else to require any qualification on this point.

But what is the meaning of this word "awarded." *Award* is usually applied to the decision of arbitrators. Now in cases of arbitration there is a question as to the existence of the asserted right on one side or the other. If the right were admitted there would be no case for arbitration. It is the decision of the arbitrators which fixes the location of the right. Until that is rendered, it is uncertain whether the asserted right will exist or not for the demandant or claimant. Besides, there can be no arbitration without parties.

The question of right to the articles subject to be awarded, and to be decided by the award, is one between the association and the certificate holders, and it is the award which decides that question; for the word award, is not confined to designate the judgment of arbitrators; it also means the final decision of any uncertain question, for instance: "The award of Providence, the award of posterity."

This uncertain question is whether the purchaser of any ticket shall have any article or not which is in the list for distribution. The act so declares.

It is manifest the statute does not give the holder of a certificate a certain right to have necessarily and inevitably some one or more of the objects subject to be awarded. If it did, there could be no decision by chance or lot as to whether he should have *any* of the articles in the advertised list. His right is dependent on the decision or award by lot, chance, &c. If this is true in respect to one certificate holder, then, as the positions and rights of all are the same, it is true as to all, and therefore all the articles advertised and subjected to the risk of distribution, need not necessarily be distributed. There is a fair chance for it, and that is all that the law requires. For if no one has any right to any of the articles

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advertised, unless the decision by the mode prescribed be in his favor, by what process of reasoning, even if we stopped here, can it be declared, that all objects advertised and subject to distribution, must be "distributed or awarded." The commencement of section seven puts "distributed" as the synonym of "awarded." Reading it in the same manner in section six, and the act declares that the certificate shall entitle the holder to any article that *may be distributed* to them *provided* chance so decides. Not to *some* article which *must* be awarded. The list to be advertised is one of articles "*to be awarded*," that is, that may be awarded.

It has been shown that the word *may* in the sentence means possibility or chance, but the legislature seemed determined not to leave the matter in any doubt. For it declares that the decision or award must be made "by the casting of lots, or by lot, chance *or otherwise, in such manner as shall be directed by the by-laws of said corporation.*" Here is an express declaration that whether the holder gets anything or not is dependent upon lot or chance, or indeed upon any scheme the by-laws of the corporation may fix on, provided such scheme secures a fair award.

What the purchaser buys is not a right to get something, but a chance to do so.

If this is not so, the legislature was most unfortunate in the use of language. For it not only authorized the corporation to fix its scheme of distribution, or awards, but it authorized the award or allotment to be made at any place in the State "that may be selected by the corporation," and at *any time and as often as the corporation may deem necessary.*

It would be difficult to frame a grant of larger powers. Bearing the object in view the grant was natural.

It requires hard work to find any but one limitation on the scheme, and that is that the association was not authorized to draw for money directly. The work is so hard that the Supreme Court, as often as the charter has been before it, and the attorneys engaged in attacks on the charter, never before found any other limitation. Of course the only value of this consideration to the judicial mind, lies in the fact that the words employed can not very obviously in their common import present an idea of the limitation suggested in the charges of the court.

These cases are: *Marks v. The State*, 45 Ala. 40; *Broadbent v. Tuskaloosa Scientific and Art Association*, 45 Ala. 172; *Warren v. The State*, 46 Ala. 549; *State ex. rel. Murphy*,

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58 Ala. The sixth section contains a proviso which has been made the basis of limiting the remarkably larger powers referred to, and it seems, by rather a strained process of reasoning.

The proviso is not a limitation on the plan of chance distribution, nor is it an enlargement of the certificate holders' rights, unless it be to ensure that the articles shall be fairly valued, so that the chances will not be fictitious. It is a condition precedent to the drawings, and the provisions of section seven show that its object was as is above stated.

The charges of the court imply that the requirement which says "a list of all the articles to be awarded at the distribution" shall be advertised before any distribution is made, is equivalent to a declaration that all the articles advertised to be distributed at any one drawing must be distributed; or, "that a definite number of ascertained articles, which have been advertised, should be all distributed to the holders of certificates."

If the word "distributed" in the sentence is to be substituted for the word "awarded," then we would have the useless expression that all articles *to be distributed* must be distributed, which is a matter of course, and if the act said this there would be no field for construction. The language of the act, however, is "a list of the articles to be *awarded* at the distribution" or drawing as indicated in the preceding part of the section, in which the scheme of distribution by awards is set forth to be of *any* articles, of the list, "that *may be awarded*" to the certificate holders, *should chance, or lot, or other manner of award favor them.*

Again, this provision follows the words "before any distribution is made." What kind of distribution? Such as had been provided for. But that was not one, of all the articles. It was of few or many, according to the results of the scheme provided for in the preceding part of the section, which the proviso was not intended wholly to subvert; for the proviso relates to the scheme.

Section seven follows in the same spirit and speaks of articles to be distributed *or awarded*, that is according to the plan authorized. If this is not so, why was the word awarded (that is allotted by chance) coupled with the word *distributed* by the disjunctive conjunction; or, so as to preclude all idea of an imperative distribution. If the distribution was intended to be an imperative distribution, the word awarded ought not to have been added as was done, so as to keep up the spirit of section six. But it is there.

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Section seven declares that the object of requiring all the articles which were subject to distribution to be advertised *with the money value annexed* to each, was that there might be no imposition in the sale of chances or certificates fixed on a false valuation of the articles. This was really necessary to insure fairness in distribution by chance; for the award by lot may be made at any place in the State, while the certificates may be sold at *every other* place in the State; so that in places remote from the drawing the published valuation would be the only means the buyer would have to judge of the value of the chance offered for sale, and of getting the equivalent of his chance when drawn.

The whole act is really in harmony in all its parts, and it requires straining to make it otherwise. Its provisions under the construction insisted on by the association are also natural when the object and purpose of the legislature is considered which manifestly believed that much money might be raised by its scheme wherewith to establish the University library.

The construction contended for by the State would so narrow the scheme as to make it useless to accomplish the declared object and purpose of the act.

It can never be sustained until judicial opinions of morality and wisdom can be substituted for the plain declarations of the legislature. Not until the line of demarcation between the powers and the functions of the legislator and the judge which has been drawn by experience and sanctioned by the wisdom of ages is broken down. Nor until the judge assumes to *make laws* by construction, to suit his peculiar notions of hardship or wrong, or public policy.—Montesquieu's Spirit of Laws, book vi. chaps. 3, 5 and 6.

H. C. TOMPKINS, Attorney-General, with whom was D. C. ANDERSON, *contra*.—1. That the evidence conclusively shows a lottery, there can be no doubt.—See 2 Whar. Am. Crim. Law, § 2429; Chavaugh's Case, 49 Ala. 396; *Alms-house v. Art Union*, 3 Seld. 228; *Wooden v. Shotwell*, 3 N. J. 470; *U. S. v. Olney*, 1 Abbott U. S. 275; *Randle v. State*, 42 Texas, 580; *Thomas v. People*, 59 Ill. 160; *Com. v. Thacher*, 97 Mass. 583.

2. But it is insisted that if such is the case, it is a lottery authorized by the act "To incorporate the Tuskaloosa Scientific and Art Association," &c., approved February 3d, 1866. The reply to that proposition is two-fold; first, that if the act in question authorized such a scheme as is con-

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tended for, it was violative of section 2, article 4, of the constitution of 1865, then in force, which provided that "each law shall embrace but one subject, which shall be described in the title." The law under which defendant is assuming to act is entitled "An act to incorporate the Tuskaloosa Scientific and Art Association for the purpose of encouraging science and art and aiding the University of the State in replacing its library and establishing a scientific museum." Its provisions are too restricted to authorize a lottery, and so far as they attempt to do so, it is void.—40 Ala. 79; 48 Ala. 129; 52 Ala. 198; 53 Ala. 601.

If the act in question did authorize a lottery, and was a valid constitutional enactment, it did not authorize such a scheme as is shown to have been carried on by defendant, and for which he was indicted. Section six of the act gives to the company the authority to sell and dispose of certificates of subscription which should entitle the holders to any article that might be awarded them, and prescribed the mode of award. Section seven provides what shall be the character of the articles awarded, and after naming articles useful for extending knowledge and science, "books," articles of art, "painting," &c., and "instruments of science," provides, "or any other property or thing that may be ornamental, valuable or useful." Now what kind of property and what things? Why certainly those of like kind as the specific articles mentioned in the preceding clause of the statute, things *ejusdem generis* with them. Things of some intrinsic value, not a thing of no value except as a promise to pay, such as a United States bond, or its coupons. Their distribution would no more extend knowledge or science, nor cultivate a taste for art, than would the distribution of money. Each owes its value to legal enactment, and the only difference between the treasury-notes and the bonds being that one is made a legal tender for the payment of debts while the other is not. Each is a promise to pay a certain sum of money, and either would be valueless did not the law authorize the promise. As it has been decided by this court that the law in question did not authorize a distribution of *money* as an award, the same objection seems to apply with equal force to an award of bonds and coupons, which like the greenbacks, owe their value to the fact that they are promises to pay authorized by law.—See *Marks v. State*, 45 Ala. 38; *Murphy v. Tuskaloosa S. & A. Ass'n*, 58 Ala. 54. This construction, also, of the character of the prizes authorized to be awarded is consistent with the well

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known rules of interpretation, that the general words in a statute are to be restrained by the specific things immediately preceding them, and also by the mere subject-matter of the act. The purpose of this act was to encourage science and art; that was to be done by a distribution by award of articles useful in extending knowledge and instructing in science, in cultivating a taste for the fine arts, and in enabling parties to make practical application of the truths of science. By a distribution of such things as these they would encourage science and fine arts, and be enabled by reason of the increased profit made on the articles by the mode of disposing of them, to contribute something to the aid of the University.—*Johnson v. State*, 32 Ala. 583; *Potter's Dwarrior on Statutes*, 269.

3. If the act in question did authorize a lottery, it was a lottery in which the element of chance entered only into the determination of the person to whom the prize should be awarded, and does not leave to chance the determination as to whether or not any prize shall be awarded. The matter to be determined by lot is, who shall receive the prizes; not what prizes shall be awarded. The act contemplated that the prizes to be awarded at any particular drawing, should be selected beforehand and a list published, and it further contemplated that on the day set for the drawing, all of those prizes should be distributed among the subscribers, not that it should be determined by lot whether any of them should be or not. This I think is very clear from a reading of the proviso to the 6th section, which is as follows: "Provided, that before any distribution is made they shall advertise in a newspaper or by some other method, a list of all the articles *to be awarded* at the distribution," &c. How "to be awarded" here can not mean that may be awarded; to construe it as meaning a thing which is only to be possibly done, as chance may determine, is directly contrary to the natural import and meaning of the phrase. To say of a thing that it is *to be done*, means more than mere possibility or mere power to do it; it implies necessity, obligation, duty, or requirement to do it. This published notice would not contain a list of the articles *to be awarded*, if it was dependent upon chance whether or not any of them should be awarded, it would be a list of articles that might or might not be awarded. We are forced to the conclusion then that the scheme authorized by the legislature was one in which on the day of distribution all of the prizes published in this list should be distributed to some one or another of the holders

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of certificates, and that the only thing to be determined by chance was to which of these they should go. And this construction is strengthened by the preceding clause of the section, which in speaking of the certificates, says, "which shall entitle the holders thereof to any articles that *may be awarded to them.*" Here was a matter that must be left to chance—whether or not the holder of a particular certificate should receive a prize; and in speaking of it the legislature uses a phrase implying doubt and uncertainty, but when they come to speak of the articles set up for prizes they use the expression importing certainty. These were undoubtedly the views of the learned judge in the court below; they are the views embodied in his charge and appear to me conclusively to be the correct construction of the statute.

4. But should these views be incorrect, still there is no law authorizing defendant to carry on a lottery of any kind. The charter of the Tuskaloosa Scientific and Art Association is avoided and repealed by the latter clause of section 26, article 4 of the constitution of 1875. Nor is it any answer to this to say that the charter was a contract and could not be repealed, for as says WRIGHT, of the New York Court of Appeals, "the necessary powers of the legislature over all subjects of internal police being a part of the general grant of legislative power given by the constitution, can not be sold, given away or relinquished. Irrevocable grants of property and franchises may be made if they do not impair the supreme authority to make laws for the right government of the State; but no one legislature can curtail the power of its successors to make such laws as they may deem proper in matters of police."—*Metropolitan Board, &c. v. Barrie*, 34 N. Y. 657; *Boyd v. Alabama*, 4 Otto, 465; *Moore v. State*, 48 Miss. 147.

If any one of the positions advanced above is correct, this judgment must be affirmed. There is no conflict in the evidence, and if any one of my views above advanced is correct, the defendant was guilty of carrying on an unauthorized lottery, in violation of the statute laws of Alabama, and the court might have charged the jury, that if they believed the evidence they must find the defendant guilty. That was the effect of the charge of the court, and though this court might conclude that the court below erred in his conclusion that the lottery was an illegal one for the reason stated in the charge, yet if they come to the conclusion that it was illegal for another reason, shown by uncontradicted evidence, then they must affirm the case, for it would be clearly, if error at all, error without injury.—1 Brick. Dig. p. 780, §§ 96-9.

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STONE, J.—On the 3d of February, 1866, the act was approved by which certain named persons and their associates and successors were “created a body corporate of the name and style of the Tuskaloosa Scientific and Art Association, for the purpose of the encouragement of art and science in the distribution of works of art, and to aid the University of Alabama in replacing its library and establishing a scientific museum.”—Pamph. Acts, 269. This corporation, alike in its name, and in the expressed purpose of its creation, offered strong claims to public approbation and support. A judicious distribution of works of art, is certainly giving encouragement to art and science. And after the destruction of the University with its library, the accumulation of years, every lover of learning, and of the State’s highest educational institution, must have rejoiced that steps were being taken to replace its lost library, and to supply it with a scientific museum. This, too, was another important step in the encouragement of art and science. What is said above comprises the whole purpose of the act, as expressed in the caption and in the first section. There is nothing in the statute, which can be construed as enlarging this purpose; for all its other provisions relate to matters of organization and detail. Sections two, three four and five confer the power to purchase, hold, sell, transfer and convey such real and personal property as may be necessary for its purposes, to make contracts, to sue and be sued, and to have a common seal; declare the amount of capital stock, and its division into shares; provide for opening books of subscription, and for organization, and direct the holding of annual and called meetings of the stockholders. Section seven specifies the articles to be distributed and awarded, (“for the purpose of the encouragement of art and science, . . . and to aid the University of Alabama in replacing its library and establishing a scientific museum.”) They are as follows: “books, paintings, statues, antiques, scientific instruments or apparatus, or any other property or thing that may be ornamental, valuable, or useful.” The articles here enumerated, each and all, fall within the domain of science and art, and refined æsthetics. They are all germane to the expressed purpose for which this body corporate was created. This enumeration strengthens the impression made by the caption and first section of the act, that the controlling purpose of the corporation was the encouragement of art and science, and the proffered aid to the State University. The general clause following this specific enumeration, of “any other property

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or thing that may be ornamental, valuable, or useful," would be usually understood and construed as embracing, and intended to embrace things of like kind. Confirmatory of the view, that only specific articles of personal property were to be offered as awards, the statute, section six, declares, "that before any distribution is made, they [the corporate authorities,] shall advertise in a newspaper, or by some other method, a list of all the articles to be awarded at the distribution, and the value of each, and all in money annexed." Bear in mind, this requires a published list of *all* the articles awarded. And this valuation is required to show its true value, as is made manifest by the seventh section, which declares that "to prevent fraud or unfair speculation, any holder of a certificate, if he has cause to believe that the article or premium awarded to him is not worth the value annexed to it in the published list," may have the same appraised, and if found of less value, may demand the advertised value in money and refuse the article awarded, or may take the article and demand the difference between the advertised and the appraised value. This clause was inserted, not as a substantive grant of power to the corporation, but as a restriction, in the interest of the certificate-holder, on the power elsewhere granted, which the legislature thought might be abused. The wisdom of this restriction will be readily seen, when it is remembered that few persons know the true, actual value of the enumerated articles to be offered as awards.

We have shown the purpose of the incorporation of the Tuskaloosa Scientific and Art Association. It is contended for appellant that the corporation was authorized by its charter to do the precise thing, for the doing of which he, as its treasurer, was indicted and convicted. This authority is claimed under section six of the act, which declares, "that the said corporation shall have the power to receive subscriptions, and to sell and dispose of certificates of subscription, which shall entitle the holders thereof to any articles that may be awarded to them." It then provides that "the distribution of awards shall be fairly made in public, after advertisement, by the casting of lots, or by lot, chance or otherwise, in such manner as shall be directed by the by-laws of said corporation." What is meant by receiving subscriptions, and disposing of certificates of subscription? And what is meant by awarding articles to the holders of such certificates of subscription? Corporations can only exercise such powers as this, when the legislature has granted them authority to do so. They can claim nothing that is not

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clearly given.—1 Brick. Dig. 403, sections 22, 23. We repeat, what is meant by subscription, in the clause we are interpreting? It is not a subscription to the capital stock of the association. That was provided for by section four of the act, and necessarily preceded organization. The subscription authorized must mean one of three things, and, perhaps, in its generality, is broad enough to include all three; that is, it means either a subscription to the purchase, or part purchase of some of the articles the association was authorized to distribute in awards, or a contribution of some article of the kind mentioned to be disposed of, or a subscription to a fund to be employed in procuring works of art for distribution, and in replacing the library of the University, and providing for it a scientific museum. Clauses of the act of incorporation make it partake somewhat of the nature of an eleemosynary foundation, while other provisions speak of private emolument of the stockholders, not more than fifteen per cent., and holds each stockholder “individually liable to the creditors and beneficiaries of said corporation to the extent of his or her stock.” Whether this dividend of fifteen per cent. is to be an annual dividend, or semi-annual, as is the rule with money corporations; whether it is to be declared on the stock subscribed and paid in; or whether it is designed to furnish a rule for the division of profits on each adventure, the charter does not inform us. This grave problem is left to interpretation. Nor does the charter, in terms, inform us how profits were to be realized for division. The articles were to be appraised at their true value. Whence the profits? This vital question was also left to interpretation. If we hold that the subscription, and issue of certificates of subscription, provided for in the sixth section, mean a subscription towards the purchase of some article to be awarded, then, to realize a profit, it would be necessary to sell chances—subscriptions as they are strangely called—to an amount which, in the aggregate, will exceed the value of the article subscribed for. This, and this only, could furnish a margin of profit. If this be the plan resorted to, then, after the requisite chances for the various articles were purchased or subscribed for, it could be determined by lot or chance to which of the subscribers to this particular article, it should be awarded. This could be determined by many of the various methods employed in games of chance; such as dice, a single number lottery, &c. It could not be determined by a lottery conducted on the numerical, or combination plan. If a contribution of the second class, was made,

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then the whole proceeds, less fifteen per cent., would remain for the charitable purposes of the corporation. On the other hand, if it mean a subscription to a fund, to be employed in procuring works of art for distribution, and in replacing the library of the University, and providing for it a scientific museum, as mentioned third above, then, to realize a profit, and thus accomplish the purpose of the act, it would be necessary that only a part of the sum subscribed should be invested in books, paintings, statues, antiques, scientific instruments or apparatus, or other property or thing, ornamental, valuable, or useful, to be distributed or awarded to the subscribers. Under this supposed and possible plan, the corporation would be primarily eleemosynary, with a moderate profit to the stockholders, to compensate them for their labor. The award, or distribution of works of art, or things of taste or use, would be employed as incentives to the public spirited and generous, to increase subscription and contribution to the laudable enterprise expressed in the caption and first section of the act. Inadequate compensation, it is true; but, nevertheless, calculated to quicken and increase contributions. Under this method, as under the other, the distribution of the awards might be determined by lot or chance; or, awards of different values might be offered to subscribers, dependent on the amount subscribed. This would dispense with the *lot or chance*, provided for in the sixth section of the act, and furnish a field of operation for the word *otherwise*, which immediately follows them.

We have attempted above to give fair and full expression and operation to every power-granting clause in the charter of the Tuskaloosa Scientific and Art Association. We think we hazard nothing in saying a reader of the charter, unless so informed, would not perceive it contained a license for a lottery. To so hold, would be to dwarf into secondary and subordinate importance, the captivating and meritorious purpose of the act, so conspicuously shown in its caption and first section, and to make its chief operative effect to consist in a liberal, if not strained interpretation of such ambiguous phrases as, "power to receive subscriptions, and to sell and dispose of certificates of subscription . . . distribution of awards fairly made in public, after advertisement, by the casting of lots, by lot or chance;" and constitutes the restraint imposed by the statute on fraudulent or excessive valuation, one of the chief powers conferred on the corporation. Nay more: it stamps the legislature by which it was enacted as the dupes of language artfully framed to conceal, rather than

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to communicate ideas and purposes; or, what is worse, with a deliberate purpose to deceive the public, by conferring corporate powers in ambiguous phrase, which they were unwilling to announce in plain terms. We might extend these reflections much further. We might comment on the infelicitous, if not inapt employment of the words "power to receive subscriptions and to sell and dispose of certificates of subscription," to convey the idea of authority to sell tickets or chances in a lottery; and of the word "award" to express the idea of the prize drawn therein. We might call attention to the fact that among the charitable acts asserted to have been performed by this corporation during the twelve years of its existence, we are not informed that it has made any offer of premiums or prizes for the best essays on science or art, or, for the most deserving works of art, by citizens of Alabama. And we might rely on this grant of power, as another argument in support of our interpretation of this statute. We will not, however, extend this line of argument.

For many years prior to 1866, it had been made a penal offense to set up, or be concerned in setting up a lottery in this State. It is now prohibited by the constitution. Corporations can only exercise powers such as this, when they are clearly expressed in their charters. We find nothing in this charter which authorizes a lottery on the numerical or combination plan, or on any other plan, where money or its equivalent is offered or distributed as premiums. As we said in *Tuskaloosa Scientific and Art Association v. State ex rel.* 58 Ala. 54, 60, "Looking into the body of the statute, we fail to find any warrant for setting up a lottery." We think, as a mere incident to the purpose of this corporation as expressed in the caption and first section of the charter, it had the power to determine the awards it would make, by lot or chance, in one of the methods we have stated above. We hold its power extended no farther. This argument ignores the question of repeal of the charter, and leads us satisfactorily to the conclusion that the Tuskaloosa Scientific and Art Association never had the authority to set up a lottery. The rulings of the City Court of Mobile are in strict accordance with these views, and its judgment is affirmed.

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Indictment for Assault with Intent to Murder.

¶1. Error; when not cured or waived.—There is no statute of this State applicable to criminal proceedings, which after judgment and verdict cures errors not previously objected to; on the contrary, our statute provides, on appeal or writ of error, that no assignment of error is necessary, but the court must render such judgment on the record as the law demands; and under the uniform practice of this court, whatever would have been good ground of motion in arrest of judgment in the court below, though not noticed there, will compel reversal here.

2. Grand jury; objection to organization of, when may be raised for first time in appellate court.—Our statutes specifically prescribe the mode of organizing grand juries; and whenever the records of a court affirmatively disclose that a body of men has been organized as a grand jury in violation of these statutes, all the acts of such body must be held void; and no laches of the accused will cure the irregularity.

3. Grand jury, organization of; what illegal.—The statute specifically defining how a deficiency in the panel of grand jurors shall be filled, and by whom this must be done, and what order the court must make, any order which confines the sheriff in summoning grand jurors to a portion only of the persons from whom the statute declares such jurors shall be drawn, or the effect of which, directly or indirectly, is the assumption of the duties required of him,—as where upon deficiency in the panel, “by order of the court a sufficient number of names, to complete the grand jury, from the by-standers in the court-room, were placed upon slips and regularly drawn,” and the jury thus completed—is illegal; and the body of men thus organized, does not become a lawful grand jury.

4. Jeopardy; when does not arise.—An indictment found by such a body of men being of no legal validity, no jeopardy arises on a trial under it.

APPEAL from Dallas Circuit Court.

Tried before Hon. GEORGE H. CRAIG.

The appellant, Isaac Finley, was indicted for an assault with intent to murder one Westbrooks. The jury found the defendant guilty of an assault with a weapon, and assessed a fine, and judgment was rendered accordingly.

The record discloses that a regular *venire* was duly issued by the clerk to the sheriff, commanding him to summon eighteen persons to serve as grand jurors. The *venire* was duly executed and returned into court, but only ten of the persons summoned appeared to answer to their names, and three of them were excused by the court. The minute-entry then recites: “By order of the court a sufficient number of names to complete the grand jury, from the by-standers present in the court, were placed upon slips and regularly drawn, and the grand jury stood as follows.”

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Numerous exceptions were reserved during the trial to rulings upon evidence, and to the giving and refusing of charges; none of which are at all material in the view which this court took of the case.

It is now assigned for error, among other things, that the court erred in the formation of the grand jury, and that it had no authority to order the grand jury to be completed from the by-standers present in court.

W. R. NELSON, for appellant.—We do not question that the court had power to complete the grand jury because of the deficiency; but the manner of doing this is *prescribed by statute*, and the court did not follow *the plain reading of the law*.

The statute on this subject says, “if fifteen persons duly qualified to serve as grand jurors do not appear; or if the number of those who do not appear is reduced below fifteen by reason of discharges, or excuses allowed by the court, or by any other cause, the court must *cause an order* to be *entered upon the minutes*, commanding the sheriff to summon from the *qualified citizens of the county twice the number of persons required to complete the grand jury*; which order the sheriff must forthwith execute, and the persons summoned by him are bound to appear presently,” &c. This mandate of the law was not followed by the court, but it *improvised* a mode of its own, and “by order of the court a *sufficient number of names to complete the grand jury from the by-standers present in the court-room were placed upon slips and regularly drawn*.”

The court, it seems, declined to pursue the plan laid down in the statute—declined to make an order and have it *entered upon the minutes*, commanding the sheriff to summon *from the qualified voters of the county*, twice the number of persons required to complete the grand jury.

This illegality *affirmatively appears from the record*. From the record it seems the court *took upon itself the duty of selecting* the grand jury, for the record is silent as to any order *given the sheriff or other officer of the court* to summon men to complete the grand jury; it would then appear that the court *made the selection* of the persons whose names should be placed upon slips and drawn.

Our statutes never contemplated that any court should thus select a grand jury, but it provided that this should be done by the executive officer of the county, to-wit, the sheriff, and it is very minute as to how this shall be done.

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"The court has no power to originate a grand jury, unless the officers charged with the duty of selecting, drawing and summoning such jury have neglected to perform their duties, and no grand jury is returned to serve at the term of the court."—*O'Byrnes v. The State*, 51 Ala. p. 27.

It does not appear from the record that the "officer charged with the duty" refused or neglected to perform his duty.

We insist that this record discloses, that although this grand jury was *congregated by order of the court*, yet it was not done in accordance with law, and is not shown to have been selected by an *authorized person*, to-wit, the sheriff of the county, nor were the persons selected taken from "the *qualified citizens* of the county.—*O'Byrnes v. The State*, 51 Ala. pp. 28, 29.

The illegality in the formation of this grand jury appears affirmatively from the record, and consequently this court is bound to notice it, whether presented to the court below or not.—*O'Byrnes v. The State*, 51 Ala. p. 29; *Miller v. The State*, 33 Miss. 356; *Harrington v. The State*, 36 Ala. 236.

H. C. TOMPKINS, Attorney-General, *contra*.—Section 4754 of the Code provides how a deficiency in the number of grand jurors shall be supplied. It provides that the court shall command the sheriff to summon from the qualified citizens of the county the requisite number. The order in this case was, that they be summoned from the by-standers in the court-room. There is nothing in the law which would require the court to order the sheriff to go outside the court-room, if a sufficient number possessing the requisite qualifications can be obtained, without doing so. Besides, section 4759 declares that the provisions of the law in relation to summoning jurors are merely directory, and section 4889 provides that no objection can be taken by plea in abatement or otherwise, on the ground that the grand jury was not legally drawn or summoned, or on any other ground going to the formation of the grand jury. The action of the court at most was merely irregular, not void.—*Battle v. State*, 54 Ala. 93; 55 Ala. 183.

BRICKELL, C. J.—The practice in criminal cases, which has been observed in this State, from an early day, and sanctioned by repeated decisions of this court, is, that a defect in the indictment which would have been fatal on demurrer, or error in the record of the proceedings, which would have

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been good ground in arrest of judgment, if that had been moved for in the primary court, will on appeal, or writ of error, compel a reversal of a judgment of conviction. The statute authorizes an amendment of an indictment, but only by consent of the defendant, entered of record. We have no statute applicable to criminal proceedings, which after verdict and judgment, cures errors not previously made the ground of objection. On the contrary, the statute is imperative, that on an appeal, or writ of error, prosecuted from a judgment of conviction, "no assignment of errors, nor joinder in error is necessary; but the court must render such judgment on the record as the law demands."—Code of 1876, § 4990.

A motion in arrest of judgment is not confined to the indictment alone. That may be sufficient, averring with certainty, the commission by the accused of the particular indictable offense imputed to him; and yet it may appear from other parts of the record, that irregularity, or illegality has intervened, which vitiates the judgment.

An indictment is defined by Mr. Bishop as "a written accusation, presented on oath by at least twelve of a grand jury, charging a person named therein with a crime which it specially defines, and returned by the grand jury into court, where it becomes matter of record."—1 Bish. Cr. P. § 141. The statutory definition, when taken in connection with the provision, that twelve of the grand jury must concur in its finding, is substantially the same: "An indictment is an accusation in writing, presented by the grand jury of the county, charging a person with an indictable offense."—Code of 1876, § 4782. An indictment proceeds entirely from the grand jury—it is the result of their deliberations on the evidence produced before them. The court has no agency, in causing the finding of an indictment, and can exercise properly no influence, beyond charging the grand jury when impanelled, as to the duties they are required to perform, or advising them on their request subsequently, as to any matter of law.

While the grand jury is a constituent of a court of criminal jurisdiction, they are a distinct, independent body, and must so deliberate and act, free from influence, fear, favor, affection, reward, or the hope thereof, proceeding from or without the court. They are selected and drawn by a body of officers appointed by the statute; and not under any order or process made or issuing under the authority of the court. When selected and drawn, the clerk of the court, (who is one of the officers charged with the duties of selecting and

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drawing), issues a *venire*, directed to the sheriff, commanding him to summon the persons so drawn, to appear at the succeeding term of the court, and serve in the capacity of grand jurors. The names of eighteen persons must be drawn, and the *venire* must correspond to the drawing; it is returned into, and becomes a part of the record of the court.—Code of 1876, § 4744. “If fifteen persons duly qualified to serve as grand jurors do not appear, or if the number of those who appear is reduced below fifteen by reason of discharges or excuses allowed by the court, or by any other cause, the court must cause an order to be entered on the minutes, commanding the sheriff to summon from the qualified citizens of the county, twice the number of persons required to complete the grand jury; which order the sheriff must forthwith execute, and the persons summoned by him, are bound to appear presently, and if necessary to serve as grand jurors, under the same penalties as if they had been regularly drawn and summoned on the original list of grand jurors for the term; and of the persons so summoned, if a greater number appear than are necessary to complete the grand jury, the names must be written on separate slips of paper, which must be folded or rolled up, so that the same may not be visible, placed in a box or substitute therefor, and from them must be drawn under the direction of the court, a sufficient number of names to complete the grand jury.”—Code of 1876, § 4754.

An accusation of a criminal offense, not the finding and presentment of a grand jury, is not an indictment, and confers on a court no jurisdiction to put the accused on a trial before a petit jury. A verdict and judgment pronounced on such an accusation are absolutely void. The Circuit Court is a court of superior jurisdiction; and it may be, if its records are silent, or general in their recitals, as to the organization of a grand jury, that the presumption of regularity and legality will be indulged to support its judgments. But if its records affirmatively disclose, that a body of men has been organized as a grand jury, in violation of the statutes which prescribe the mode of organizing such a jury, clothed with the power of making presentments which operate as criminal accusations against the citizen, all the acts of that body must be pronounced void—no solicitation, or laches, on the part of the accused can cure the illegality. It would be ground of motion in arrest of judgment—and if no such motion is made, of assignment of error in an appellate tribunal; and if not assigned, it is of that class of errors this court

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must notice in obedience to the statute, and "render such judgment on the record as the law demands."—*O'Byrne v. State*, 51 Ala. 25.

The present record discloses that a *venire* was regularly issued by the clerk of the court directed to the sheriff of the county, commanding him to summon eighteen persons whose names, places of residence, and respective occupations are stated, to serve as grand jurors. The *venire* was returned into court, but only ten of these persons appeared—three of whom were excused. The record proceeds: "By order of the court a sufficient number of names to complete the grand jury from the by-standers in the court-room was placed upon slips and regularly drawn, and the grand jury stood as follows:" (reciting the names of seventeen persons).

It is apparent the court did not exercise, and did not intend to exercise the power the statute confers, of supplying deficiencies in the panel of grand jurors. The order the statute required the court to make, was a direction and mandate to the sheriff; and in the execution of the order, the statute is imperative; the sheriff must summon, not from any designated or limited class of persons—not from the by-standers who are in, or near to the court-room, but from the *qualified citizens of the county*. Without the agency of the sheriff, but in exclusion of it, the court orders a *sufficient number of names to complete the grand jury from the by-standers in the court-room*, to be placed upon slips and drawn. The statute imposes on the sheriff the duty and responsibility of summoning the persons, from whom a sufficient number to complete the grand jury are to be drawn, and the court could not exclude him from the performance of the duty, or transfer it to another, or assume to perform it. Nor could the court limit the summoning to the *by-standers in the court-room*. The statute defines the power of the court, and the exercise of any other power is unnecessary and unwarranted. Unnecessary, because before administering the oath to grand, or petit jurors, it is the duty of the court to examine them in reference to their qualifications—to ascertain whether they "are competent to discharge the duties of grand and petit jurors with honesty, impartiality, and intelligence, and are esteemed in the community for their integrity, fair character, and sound judgment."—Code of 1876, § 4760. If there is reason to apprehend, that the sheriff in violation of his official oath and duty, would introduce into the jury box, persons wanting in these qualifications, or any one of them, the preventive must be found in a vigilant and discreet

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examination of the persons summoned. If that will not avail, it is the only preventive the statutes have provided, and legislative aid must be invoked to supply any other. The court can not devise another—can not intervene and transfer from the sheriff the duty and responsibility the statute imposes.

If the court was correct in limiting the summoning *to the by-standers in the court-room*, it has an unlimited power in this respect, and would then have unlimited power and influence in the selection of the persons who were to fill deficiencies in the panel, and to serve in the capacity of grand jurors. With equal propriety, the court could have designated the particular by-standers from whom the deficiencies were to be supplied. The exercise of such a power by the court, would be in violation of the spirit of all our legislation, and would convert the grand jury from a distinct, independent body, drawn and summoned by officers specially charged with that duty, into a mere dependency of the court, chosen by its absolute will. The practical results of such a power, are too apparent to require discussion or statement. There is no reason for imputing to the court in this instance, more than *mere error*; but the power exercised, in the hands of a capricious, or an unscrupulous judge, would destroy the purity and independence of the grand jury, and pervert it from all the purposes of its institution.—*O'Byrnes v. State, supra*; *Portis v. State*, 23 Miss. 578; *Keitter v. State*, 4 Iowa, 291. The record affirmatively disclosing that this accusation is not an indictment—that it proceeds from, and is the act of a body of men, organized as a grand jury in violation of law—it follows the judgment of conviction must be reversed. It is proper to add, however, that the appellant has not been in jeopardy, and this judgment will not be a bar to a legal prosecution, if he is guilty of the offense charged. Under the influence of the statute, (Code of 1876, § 4819,) the cause will be remanded, that the accusation may be quashed; the prisoner must remain in custody, until discharged by due course of law.

[Ulmer v. State.]

Ulmer v. State.*Indictment for selling liquor without License.*

1. *Code of 1876, section 4204 et. seq. construed.*—One of the three offenses embraced in section 3618 of the Revised Code was entirely omitted from the Code of 1876. Section 4204 of that Code punishes the sale of vinous or spirituous liquor, without license, in any quantity, when drank about the premises; and the succeeding section punishes a sale, whether with or without a license, to minors or persons of known intemperate habits; but the third offense,—selling vinous or spirituous liquor in any quantity less than a quart,—was entirely omitted; and hence from December 9th, 1877, the date when the Code of 1876 went into effect, until the statute of December 30th, 1878, which remedied the defect, there was no law punishing the selling, without license, of vinous or spirituous liquor in any, the smallest quantity, unless it was drank on the premises, or unless the seller “*engaged in, or carried on*” the business without license.

2. *Indictment; what insufficient.*—An indictment which merely charges a sale of vinous or spirituous liquor, without license and contrary to law, &c., is insufficient as to cases falling under section 4204, and 4274 of the Code of 1876; in the one case it is necessary to aver that the liquor was drank about the premises, and in the other, that the accused “*did engage in or carry on the business,*” &c.

3. *Same; what cases covered by section 4806 of Code of 1876.*—Under section 4806 of the Code, an indictment charging that the defendant “*sold vinous or spirituous liquor, without license and contrary to law,*” &c., is sufficient, when an unlicensed “*retailer,*” sells liquor of any kind in any quantity, if the same is drank on or about his premises, and is also good for violation of any special and local laws; that section, however, applies only to unlicensed retailers that were punishable under the Code of 1876, and is not sufficient in prosecutions under sections 4205 and 4206 of that Code.

4. *Same; what indictment sufficient, since act of December 3d, 1878.* Since the enactment of December 3d, 1878, it would seem that the form of indictment pursued in this case is sufficient, in cases where a retailer sells vinous or spirituous liquor, of any kind, in any quantity less than one quart, or in any quantity, if the same, or any portion thereof, is drank on or about his premises. It has no reference to offenses by licensed retailers, or to the offenses defined in sections 4205 and 4206.

5. *Cases followed.* *Finley v. The State*, ante p. 201, followed as to the organization of grand juries.

APPEAL from Circuit Court of Dallas.

Tried before Hon. GEORGE H. CRAIG.

The appellant, Ulmer, was convicted under an indictment found in November, 1878, which charged that before the finding thereof, he “*sold vinous, or spirituous liquors without license and contrary to law, against the peace,*” &c.

The evidence showed that within twelve months before the finding of the indictment, and in one mile of the town of Orrville, in Dallas county, the “*defendant, in the fall of*

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1878, sold all kinds of liquor in a temporary bar-room," on the fair grounds, while a fair was being held. The defendant moved to exclude all this testimony, on the ground that the act of the legislature, forbidding the sale of liquor within five miles of Orrville—approved March 5th, 1875—and which was read in evidence, repealed the general law against retailing, and that the offense charged was covered by said local act. The court refused to exclude the testimony, and defendant excepted. The foregoing was all the evidence.

The court of its own motion charged the jury, 1st. That if they believed from the evidence beyond a reasonable doubt, that the defendant did within twelve months before the finding of the indictment in this cause, in Dallas county, and State of Alabama, in any kind or in any quantity, sell any vinous or spirituous liquors, and that the same was drank on or about the premises where the liquor was sold, then the defendant would be guilty, as charged in the indictment. 2d. The fact that there was a local law prohibiting the sale of liquors at or near Orrville, made no difference, and that the defendant could be convicted under the general law as charged in the indictment, although the evidence showed that the liquor was sold in one mile of Orrville, Dallas county. The defendant separately excepted to each part of said charge, and requested the court to charge the jury "that if they believed the evidence they must acquit the defendant." This charge was refused, and he excepted. The judgment-entry recites that a demurrer to the indictment was overruled, but the demurrer is not set out. The minute-entry of the organization of the grand jury recites, that a sufficient number of persons summoned as grand jurors, not appearing, "by order of the court a sufficient number of names to complete the grand jury from the persons present in the courtroom, were placed upon strips and regularly drawn, and the grand jury stood as follows."

The various rulings to which exception was reserved, and the illegality of the formation of the grand jury, are here assigned as error.

JOHNSTON & CLARK, for appellant.—The indictment does not pursue any form provided by law; and it was necessary that it should have charged every ingredient of the statutory offense. It should have charged where the offense was committed—the person to whom the liquor was sold—the particular kind and the quantity in which it was sold, whether vinous or spirituous, and that it was drank on the premises.

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45 Ala. 86; 18 Ala. 112; Code of 1876, § 4785. The charge of the court should have embodied all the ingredients of the offense.—54 Ala. 224; 44 Ala. 416; 17 Ala. 181.

The order as to the completion of the grand jury, was illegal and without authority. The Code prescribes the only mode in which the jury could be completed. The statute imposes duties on the sheriff, which the order took away from him. A body so organized is not a legal grand jury, and its indictment is invalid.

HENRY C. TOMPKINS, Attorney-General, *contra*.

STONE, J.—Section 3618 of the Revised Code is, in substance, what had been statutory law in this State for many years, except that one provision as to its punishment was then of recent enactment.—Code of 1852, sections 1058, 1059, 3280; Stone & Shepherd's Penal Code, section 76; Clay's Dig. 554, section 4. As found in the Revised Code, the section provides that if an unlicensed retailer "sells vinous or spirituous liquors of any kind in quantities less than one quart, or by the quart or less quantity, to any person of known intemperate habits, or in any quantity if the same is drunk on or about his premises," must, on conviction, be fined, and may be imprisoned, or sentenced to hard labor for the county. This section, as will be perceived, embraced three distinct offenses; first, any sale, in quantity less than one quart, no matter to whom made, or where drunk; second, any sale in quantity not exceeding one quart, to a person of known intemperate habits; third, a sale in any quantity, if the same is drunk on or about the premises of the seller. This section, as we will hereafter show, has been many times construed in this court. It has long been the settled policy of this State to tax the traffic in ardent, vinous or malt liquors, by requiring that persons engaging therein shall first take out a license. In the revenue law of February 19, 1867, section 106—Pamph. Acts, 295—it is declared to be a misdemeanor in any person who does any act or does any business for which a license is required to be taken out, or tax paid under certain sections of that act—(retailing spirituous or vinous liquors is embraced in them—) without having first taken out and paid for such license, or paid such tax; and the offender shall be fined double the amount of such license or tax so required. This section of the revenue law was made section 3652 of the Revised Code. In the revenue law approved December 31, 1868, section 111, Pamph. Acts 330,

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it is declared, "That any person who, after the third Monday in March in 1869, shall be engaged in, or carry on any business or profession, or do any act, for the doing, prosecuting, or carrying on of which a license is by law required to be taken out, without having paid for and taken out such license, shall be deemed guilty of a misdemeanor, and shall be fined three times the amount of such license, and may be confined in the county jail not exceeding one year, at the discretion of the court." This court ruled that this section of the revenue law defines a new and distinct offense, is not repugnant to section 3618 of the Revised Code, and that both statutes were of force. Under the former law it was held that any one act done in violation of its provisions, exposed the offender to its penalties. To sustain an indictment under the revenue law, it was held that the accused must have *engaged in* the business; or, where the act constituting the offense was not a continuous profession or occupation—(the exhibition of a show, for instance—) must have done *the act* charged against him.—*Martin v. The State*, 59 Ala. 34; *Mulvey v. The State*, 43 Ala. 316; *Lillenstein v. The State*, 46 Ala. 498; *Campbell v. The State*, 46 Ala. 116; *Häfter v. The State*, 51 Ala. 37; *Weil v. The State*, 52 Ala. 19; *McPherson v. The State*, 54 Ala. 221; *Lawson v. The State*, 55 Ala. 118.

Section 4204, Code of 1876, representing section 3618 of the Revised Code, is so altered as to read as follows: "Any person who, not having first procured a license as a retailer from the proper legal authority, under the revenue law, sells vinous or spirituous liquors of any kind in any quantities, if the same is drunk on or about his premises, must on conviction be fined," &c. It will be readily seen that section 4204 omits two of the three offenses embraced in section 3618 of the Revised Code. Section 4205 provides for one of the omitted offenses; while the other—selling "vinous or spirituous liquors of any kind in quantities less than one quart," is nowhere retained. To be "engaged in, or carrying on any business for which a license is required, without having taken out such license," is retained as a misdemeanor, and constitutes section 4274 of the Code of 1876. It is thus shown that after the Code of 1876 went into effect—December 9, 1877—there was no punishment in this State for selling without license spirituous or vinous liquors, in any the smallest quantity, unless the liquor was drunk on or about the premises of the seller, or unless the seller *engaged in, or carried on* the business, without first taking out a license. True, certain other statutory offenses, falling under this head,

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were retained; such as selling to minors, students of schools, persons of known intemperate habits, &c. Those, however, do not affect this case.

The indictment in the present case would have been sufficient under section 3618 of the Revised Code. It is fatally defective under section 4274 of the Code of 1876. An indictment under that section, to be good, must aver that the accused was engaged in, or carrying on the business. Form of indictment numbered 30 in the Revised Code, *Retailing without License*, is omitted from the Code of 1876; done, we suppose, because the codifiers had materially changed the the provisions of section 3618, to which that form was adapted. The later Code, however, contains forms intended to apply to this changed section—(No. 4204, 5, 6 of the Code of 1876—) numbered 58, 59, 60. But they retained section 4133 of the Revised Code, and made it 4806 of the Code of 1876. That section declares, that “in an indictment for retailing vinous or spirituous liquors without a license, it is sufficient to charge that the defendant sold vinous or spirituous liquors without a license, and contrary to law; and on the trial, any act of retailing in violation of law may be proved; and for all violations of any special and local laws regulating the sale of spirituous liquors within the place specified, the common form of indictment under this section shall be held good and sufficient in law.” This section, we hold, makes the indictment found in this record sufficient, when an unlicensed retailer “sells vinous or spirituous liquors of any kind in any quantities, if the same is drunk on or about his premises.” It would also be good and sufficient for “violations of any special and local laws regulating the sale of spirituous liquors within the place specified;” for such is the language of the statute. It applies, however, only to unlicensed retailers that were punishable under the Code of 1876, and would not be sufficient, in prosecutions under sections 4205 and 4206 of that Code. What we here say refers alone to the Code of 1876, as it was adopted. The omission in the Code has been remedied by statute of December 3d, 1878, which again makes it an indictable offense in any person who sells vinous or spirituous liquors of any kind in any quantity less than one quart, without having first procured a license as a retailer. Pamph. Acts, 71. The result of this enactment probably is, to restore the fitness and sufficiency of the indictment found in this record, where an unlicensed retailer sells vinous or spirituous liquors of any kind in any quantity less than one quart, or in any quantity if the same, or any portion thereof,

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is drunk on or about his premises. It has no reference to offenses by licensed retailers, or to the offenses defined in sections 4205 and 4206 of the Code of 1876.

Some of the rulings of the Circuit Court are not reconcilable with our views given above, and the result is that the judgment must be reversed. But, inasmuch as the facts of this case may bring it within the provisions of the statutes, as they remained of force after the Code of 1876 went into effect, we will remand the cause.

The question on the organization of the grand jury by which this indictment was found, was considered and decided in the case of *Finley v. The State*, ante p. 201. We need not consider it farther. That decision will lead to the quashing of this indictment, when the case returns to the Circuit Court.

Let the defendant remain in custody until discharged by due course of law.

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Indictment for Murder.

1. *Repugnant statutes in same Code; how construed.*—Where repugnant statutes are incorporated in the same Code, the original statutes, their dates, and even their judicial interpretation will be consulted, to ascertain the legislative intent.

2. *Hard labor for county; when may be imposed.*—The court traces the origin of section 4296 of the Code of 1876, which authorizes the imposition of hard labor for the county for not less than ten years on conviction of murder in the second degree, and also of section 4450 of the same Code, which requires that "in all cases where the period of imprisonment or hard labor is for more than two years, the sentence must be to imprisonment in the penitentiary; and as the act from which the provisions of section 4450 was taken, was passed long after the statute incorporated in section 4296, and necessarily repealed inconsistent provisions of the Code and laws existing at its passage, full effect must be given to section 4450; and the result is, that the words "or sentenced to hard labor for the county," are stricken out of section 4296 of the Code, and all other of its provisions, which fix as punishment for crime, imprisonment or hard labor for the county, for a longer period than two years.

3. *Evidence; what irrelevant.*—Where the quarrel arose about taking planks out of deceased's porch by defendant, and the latter when deceased asked why it was done, replied in an angry and threatening manner, without giving any reason for his act, leaving deceased entirely uninformed as to the reason, after which they separated, and defendant, about an hour afterwards, meeting deceased, without any subsequent altercation between them, or mutual blows, struck the fatal blow,—proof that defendant removed the plank

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by direction of the common superior of himself and deceased, having no tendency to influence the conduct of the deceased, or to justify or mitigate the act charged against the prisoner, is inadmissible.

4. *Res-geste*; what not part of, and inadmissible in favor of prisoner. The fact that the prisoner an hour after the difficulty, in which he struck the fatal blow, made complaint of being hurt himself, or that he next day made an affidavit or complaint before a magistrate, against the deceased, is no part of the *res-geste*, and is inadmissible on the prisoner's behalf, when tried for murder.

APPEAL from Circuit Court of Wilcox.

Tried before Hon. JOHN K. HENRY.

The appellant, Emanuel Steele, was indicted for the murder of James Herbert, *alias* Captain Herbert, found guilty of murder in the second degree, and sentenced, in accordance with the verdict, to ten years imprisonment at hard labor for the county.

The evidence shows that Steele and the deceased were both tenants of Mrs. Mathews, and lived on her plantation which was managed by one Forniss. About an hour before deceased was killed, he and the prisoner were heard quarreling. Deceased asked him, "why did you take up the plank from my floor?" Defendant replied, "I would have torn you up, if you had been there." Deceased replied, "If you talk that way, I will go and get the planks." One witness for the State testifies that in reply to this the prisoner said, "If you take the plank I will kill you." Another witness testified that after prisoner's remark that he would have torn deceased up if he had been there, the deceased replied, "If you can't give me more satisfaction, I will go and get my plank," when defendant replied if he did he would kill him. No blows passed at this time. Shortly after this, probably not over an hour, deceased went to some "bars," in the direction of the gin-house, and a "lick" was heard. It was then dark. Defendant was seen at the "bars" about this time. Witness went to the bars and found deceased staggering. He had received a blow on the left temple, from which he became speechless, and died two days afterwards. One witness for the State testified that he saw a blow pass at the bars, but he could not tell who struck it, but immediately afterwards he heard defendant say, "I will kill you." This witness and others testified, that "some plank from the piazza or gallery of the house occupied by deceased had been removed by the defendant and used in fixing the gin-house." The evidence showed that the "bars" spoken of, were in the direction where the gin-house was, from the place where the quarrel occurred. It was also shown by the State, that

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after the difficulty prisoner went to a house about two miles off, called out his brother-in-law, told him he "had knocked Captain Herbert in the head, and asked witness to go and see about it."

It was proved in behalf of defendant that the plantation where the difficulty occurred, and on which prisoner and deceased both lived, belonged to Mrs. Mathews, and that she "had not rented the house to deceased, but only loaned it to him," during good behavior. It was shown that Forniss was manager, and had control of it and the property thereon. The bill of exceptions recites, "the said Forniss was then asked by defendant, whether or not at the time of said difficulty, he (Forniss) had given any order or direction to defendant in reference to any plank on said place?" The court on the objection of the solicitor, refused to allow the witness to answer, and defendant excepted. Forniss was then asked by defendant, "whether or not he had, previous to said difficulty, given the defendant any order or direction in reference to the use of any plank belonging to or connected with the house at that time occupied by deceased?" The court, on objection of the solicitor, refused to allow the witness to answer, and defendant excepted. Forniss having testified that defendant, after the blow was struck, had ridden on a mule to witness' house, which was four miles from the place where the difficulty occurred, the defendant asked "whether or not at that time defendant made any complaint of any injury to his person?" The court, on objection of the solicitor, refused to allow the witness to answer, and defendant excepted. The defendant introduced witnesses who testified that they had examined his person next day, and found bruises over the region of the kidney, and it was also shown that though before this prisoner was a hale and hearty person, he afterwards suffered from a *hematuria*, which physicians, who were examined, testified could be produced by such a blow, and also by exposure and cold.

The defendant then introduced one Valtz, a justice of the peace, who lived a few miles from the place where the difficulty occurred, and after proving by him that the defendant came to him on the morning of the next day after the difficulty, asked the witness: "Did or did not defendant when he came to your house make complaint before you?" The court, on the objection of the solicitor, refused to allow the witness to answer, and defendant excepted. A similar ruling was made and exception reserved to the refusal to allow this witness to state, "whether defendant then made any affidavit before him."

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The various rulings to which exception was reserved are now assigned as error.

R. GAILLARD, for appellant.—1. The evidence of the State put the prisoner in the attitude of a trespasser, and in the wrong in taking the plank. Why the plank was taken, thus became material. It also tended to rebut previous malice. It tended to throw light on the quarrel.—*Milburn v. State*, 1 Md. 1; *State v. Pellus*, 2 Halstead, 220; 1 Swann (Tenn.) 248; 19 Ohio, 302.

2. The complaint prisoner made of pain when he went to Forniss' house, was admissible evidence.—1 Phillips on Evidence, p. 182; Best, Law of Evidence, p. 887, note a; *Johnson v. The State*, 17 Ala. 618. If proof had been allowed as to the complaint prisoner made before the justice, it would have shown the *bona fides* of his former complaint of injuries, and have shown that he did not fear an investigation.

H. C. TOMPKINS, Attorney-General, *contra*.—1. The declarations of defendant to Mr. Forniss were clearly inadmissible. Such declarations may be admissible to prove the character of an injury, when the fact that there was an injury has been otherwise proven, but they can not be admitted in a case like this, where they would be the only evidence that deceased had struck defendant a blow. If they were, a defendant would be permitted to make evidence for himself. But this declaration was inadmissible, even if there had been other proof of an injury; for such declarations made when there has been an opportunity to think over the matter in reference to projected litigation, are inadmissible. The evidence that defendant had made a complaint, and taken out on the day after the difficulty, a warrant for his victim, whom he knew was at the very moment lying speechless and senseless from the effects of the blow he had given him, was even a more glaring effort to override the salutary rule that a person shall not be permitted to manufacture evidence in his own behalf than the other, and the court very properly refused to admit the proof of either fact.—1 Whar. on Evidence, § 268; *Hall v. State*, 40 Ala. 698.

2. The refusal of the court to permit the defendant to show that he had been authorized by Mr. Forniss to remove the lumber, was clearly not erroneous under the circumstances of this case. When defendant was approached by deceased about the matter, he gave no such reason therefor. The proof is undisputed that defendant's only answer, when

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questioned, was, "if you had been there, I would have torn you up." He did not claim to have had any authority from any one to do so. The proof fails to show any provocation whatever for the blow, and can the fact that defendant had instructions to remove the plank, in any way justify him in taking the life of deceased, or reduce the grade of his offense? He refused to give deceased his authority for doing so when called upon by him to do so; but now that he has deprived him of his life, seeks to justify it by showing that he had authority for removing the plank.

STONE, J.—The following two provisions are embodied in the Code of 1876: Section 4296. "Any person who is guilty of murder in the second degree must, on conviction, be imprisoned in the penitentiary, or sentenced to hard labor for the county, for not less than ten years, at the discretion of the jury." Section 4450, after declaring the different modes of punishment, contains this clause: "In all cases in which the period of imprisonment, or hard labor, is more than two years, the sentence must be to the penitentiary." These two clauses are incompatible with each other, and can not both be enforced. We know as fact that section 4296 of the Code is but a copy of section 3654 of the Code of 1867, which is itself a copy of section 112 of Stone & Shepherd's Penal Code, adopted February 23, 1866.—Pamph. Acts, 121. We know, too, that the clause of section 4450, Code of 1876, copied above, became law long after the Revised Code of 1867 was adopted, by force of the act "To provide for the punishment of persons convicted of crimes in certain cases," approved March 7, 1876.—Pamph. Acts, 287. The Code of 1876 did not become operative and binding, until thirty days after the Governor's proclamation. The proclamation was issued November 9th, 1877, and hence that compilation became the law of the land December 9th, 1877. From the date of the statute, March 7th, 1876, which declared that when "the period of imprisonment or hard labor is more than two years, the sentence must be to the penitentiary," till the day the Code went into effect, December 9th, 1877, there could be no sentence to hard labor for the county for a period longer than two years. The act of March 7, 1876, had, by necessary implication, repealed all provisions of our penal code, which authorized punishment by hard labor for the county, for a longer term than two years. This repeal changed a great many sections of the Code, and among the rest, it struck from section 3654 of the Revised Code, de-

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claring the punishment for murder in the second degree, the words, "or sentenced to hard labor for the county." So that, for offenses committed during that interval, of the higher grades, and requiring imprisonment extending beyond two years, the sentence must of necessity have been to imprisonment in the penitentiary. What effect has the incorporation of both these provisions in the Code? We have seen they are repugnant, and can not both stand. Which shall yield to the other? It is our duty to carry into effect the intention of the legislature, to be gathered from their language. In *Thompson v. The State*, 20 Ala. 54, this court said, "the inartificial manner in which many of our statutes are framed, the inaptness of expressions frequently used, and the want of perspicuity and precision not unfrequently met with, often require the court to look less at the letter or words of the statute, than at the context, the subject-matter, the consequences and effects, and the reason and spirit of the law, in endeavoring to arrive at the will of the law-giver." And in *Smith v. Smith*, 19 Wise, 522, and *Bishop v. Schneider*, 46 Mo. 472, the several courts considered the effect of abridging and embodying statutes in a code, and consulted the original statutes, their date, and even their judicial interpretation, in arriving at a proper construction of the legislative intent. In each case, though the statutes had been changed in phraseology and in arrangement, they gave effect to them as framed by the legislature. As we have said, the two sections of the Code are incompatible, and we can not give effect to both. We think we carry out the legislative will by giving full effect to section 4450 of the Code, and holding, which we do, that the words, "or sentenced to hard labor for the county," are stricken out of all statutes which provide, as a punishment, imprisonment or hard labor for a period longer than two years. It results that the conviction in this cause must be reversed.

We do not think the Circuit Court erred in its several rulings on the introduction of evidence. The fact that Forniss, the manager, gave the defendant instructions to take plank from the piazza of the deceased, could not have shed any light on the circumstances of the killing, or the motive or animus of the deed. If all or any of the testimony bearing on this question can be relied on, the defendant did not inform deceased that he had been instructed by their common superintendent to take the plank. There was nothing in the language of the deceased, as testified to, to give offense, unless the tone or manner was insulting. Of this the record says

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nothing. The reply of the accused was rude, and calculated to irritate. If, instead of the remark, "I would have torn you up if you had been there," the deceased had been informed that the planks were taken in pursuance of the orders of Forniss, the superintendent, it is not likely that further altercation would have ensued. But, according to the testimony, the parties separated after this, and the fatal blow was struck about one hour later. Only one witness saw the blow inflicted. Others testify to having heard it. No one speaks of mutual blows, or of any altercation or words at that time. We can not perceive any tendency in the testimony rejected, uncommunicated as it was to the deceased, calculated to influence the conduct of the deceased, or to justify or mitigate the act charged against the defendant.

That defendant, an hour or more after the blow was struck, made complaint, or complained of injury to his person, he had no right to prove in his own defense. The customary exclamations of present pain or suffering, as a general rule, are independent and primary evidence. The offer in this case does not fall within the rule. Nor can we perceive any principle, on which defendant's complaint to the justice, or affidavit made, could be made evidence for him. Reversed and remanded, but the prisoner will remain in custody until legally discharged.

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Attachment.

1. *Judgment; what not grounds for reversal of.*—A correct judgment will not be reversed, even though a wrong reason may be given for it, *e. g.*, as where the court orders pleas in abatement to be stricken from the file, because not filed in time, and the affidavit and writ of attachment plainly show the falsity of the pleas.

2. *Affidavit for attachment; what sufficient.*—An affidavit for attachment, made by the attorney of a non-resident creditor, which states that affiant is "*informed and believes, and therefore states,*" that defendant, who is also a non-resident, is justly indebted, &c., is not defective.

APPEAL from City Court of Selma.

Tried before Hon. JON. HARALSON.

This was an original attachment sued out by the appellees, Pitts and Henry, on the 20th day of November, 1876, against

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the appellant Mitchell, and returnable to the City Court of Selma on the first Monday in January, 1877.

The affidavit states that one of the attorneys for the plaintiffs appeared before the clerk, and after being sworn, stated that he is an attorney for said Pitts and Henry, "and that he is informed and believes, and therefore states, that Henry P. Mitchell is justly indebted to William J. Pitts, and George Henry, who are residents of the State of Maryland, in the sum of one hundred and sixty-two dollars and thirty-four cents, by promissory note, dated Sept. 16th, 1876, and due on demand, and that said Henry P. Mitchell resides out of the State of Alabama, and that according to the best of affiant's knowledge and belief, said Mitchell has not sufficient property within the State of his residence wherefrom to satisfy the debt due to said Pitts and Henry as aforesaid, and that an attachment is not sued out for the purpose of vexing or harrassing the said Henry P. Mitchell." The writ of attachment recites that "whereas W. J. Pitts, and George Henry, by their attorney, S. W. John, hath complained on oath, &c., that Henry P. Mitchell is justly indebted to said Wm. J. Pitts, and George Henry, to the amount of one hundred and sixty-two dollars and thirty-four cents, and oath having been made that said Henry P. Mitchell resides out of the State of Alabama, and the said Wm. J. Pitts, and George Henry, have given bond and security according to the act in such cases made and provided, and made oath that the attachment was not sued out for the purpose of vexing or harrassing the said Henry P. Mitchell," therefore the sheriff was commanded to attach so much of the estate of said Mitchell, &c. The attachment was levied on lands of the defendant on the day it was issued, and returned according to its mandate.

At the January term, 1877, the defendant "appeared specially by counsel for the purpose of filing pleas in abatement," and plead in abatement, 1st, that the attachment does not show any debt or demand was justly due by defendant to plaintiffs in the suit; 2d, that the attachment does not state the amount of plaintiffs' demand and that it is justly due by defendant; 3d, that the attachment was wrongfully and improperly issued, the affidavit on which the writ was predicated not having stated the amount of plaintiffs' debt or demand, and that it was justly due as required by law."

"The complaint and affidavit on which said attachment issued, were written on the same paper and at the same time, and the complaint accompanied the affidavit and attachment

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into the hands of the clerk, and were received by him together, but the complaint was never separately endorsed by the clerk as filed." The court struck the pleas from the file, on motion of the plaintiffs, on the ground that they were not filed within the first three days of the return term. The defendant excepted to this action of the court, and thereupon declined to appear further on the cause, which proceeded to judgment against him.

The ruling of the court is now assigned as error.

STERRETT & MABRY, for appellant.

FELLOWS & JOHN, *contra*.—It was within the discretion of the lower court to strike from the files pleas filed after time for pleading was past. The pleas had nothing to stand on, being flatly contradicted by the record, and therefore no harm was done, even if the motion to strike from the files was erroneously granted. Appellant had an opportunity to plead in bar, and refused to do so. Dilatory pleas are not favored.

MANNING, J.—Whether the reason assigned in the motion for taking the pleas in abatement from the file in this cause, was a sufficient one or not, for granting the order that it be done, we are of opinion that there was no error in the ruling of the court. The averments of the pleas in abatement are—1st, that the attachment "does not show that any debt or demand was justly due," &c.; and 2d, that the affidavit on which it was founded "does not state the amount of the plaintiffs' debt or demand, and that it is justly due," &c., "as required by law."

But on referring to the attachment, we find no such defect as is alleged in it. In that particular the writ is without fault. In respect to the affidavit: It shows that the person who made it was attorney for plaintiffs, who resided in Maryland, and that affiant "is informed and believes and therefore states" that defendant (who was also a non-resident) "is justly indebted to plaintiffs in the sum of \$162.34, by promissory note dated September 16, 1876, and due on demand."

If it was supposed by counsel who filed the pleas that the recital in the affidavit that affiant was *informed and believed* that defendant was indebted, &c., impaired the efficiency of his averment thereupon made, of such indebtedness, we do not agree with him. In such a case as the present, where both

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parties reside out of the State, it is almost impossible that an attorney residing in it and at a distance from the parties to the transaction, can absolutely know that the debt is still due and unpaid. The debtor might have discharged it since the creditor last communicated with his attorney—perhaps to some other agent of the creditor, if not to himself. So other causes, for which writs of attachment may issue against debtors, and which according to the statute, must, when they constitute the reason for issuing such writs, be as positively sworn to in the affidavits, as the indebtedness of defendants, are of a nature which prevents it from being positively known whether they are true or not. Among these causes, are the following: that the defendant “is about to remove out of the State,” or “to remove his property out of the State,” or “to dispose of his property fraudulently.” These things consist in the intention of other persons. And if “the plaintiff, his agent or attorney,” who by law may make the oath, must positively know them to be true, before he may swear to them, it could hardly ever happen that such causes would be available in any instance.

It will be observed that the oath in this case is, not merely that plaintiff is informed and believes that defendant is justly indebted, &c.—but “that he is informed and believes and *therefore states*” that he is indebted. The averment of indebtedness in this way, is allowable when made by an agent or attorney. Besides the security against improperly proceeding by attachment, which the oath affords, if the cause alleged be not true in fact, the defendant is entitled to an action on the bond required for his indemnity.

The pleas in abatement plainly appearing upon inspection of the writings not to be sustained by the contents of the papers in the cause, to which they referred, there was no error in ordering them to be taken from the file, in order that the suit be prosecuted to a conclusion.

Let the judgment of the City Court be affirmed.

NOTE BY REPORTER.—After the delivery of the foregoing opinion, the appellant applied for a rehearing, and filed in support thereof the following argument :

In *Hall and Curry v. Brazelton*, 40 Ala. 406 and 408, in opinion, the court says that “the statute in imperative language requires a sworn statement of the amount of the debt or demand, and that it is justly due”—this is the language of the Code.—§ 3255; *Sims, Harrison & Co. v. Jacobson &*

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Co. '51 Ala. 136 and 188 in opinion; *Hall and Curry v. Braxelton*, 46 Ala. 359.

We especially call the attention of the court to *Dyer v. Flint*, 21 Illinois, 80, where a statute almost identical with our own, was construed by the Supreme Court in an attachment suit against a non-resident. The court there held that the affidavit made by the plaintiff's agent or attorney as to the existence of the debt, on information and belief, was *not* a sufficient averment of the existence of the debt.—18 Wend. 611.

Under section 3258 of the Code a non-resident, by his agent or attorney, may sue out an attachment against another non-resident of the State, but must make the oath required as in other attachment cases, and then may state on information and belief that the defendant has not sufficient property within the State of his residence wherefrom to satisfy the debt. This section applies to plaintiff's agent or attorney, as well as to himself.

Under section 2568 of the Code, executors and administrators may file claims against insolvent estates on information and belief; these are expressly permitted by statute, but even here the Supreme Court says in *Pickle's Administrator v. Ezzell*, 27 Ala. 623, that knowledge of the correctness of the claim and that it is due, must be averred, and in *Lay v. Clarke's Administrator*, 31 Ala. 409, the affidavit must show that the claim is a just and subsisting demand.

The following response was made thereto by MANNING, J.:

The judgments of this court are rendered upon the rulings and action of the court appealed from, not upon the reasons assigned for them; though these when known to us, of course, receive our consideration. A correct decision is not reversed, even if a wrong reason is given for the decision.

If we had any doubt of the correctness of our judgment in this cause, we would grant the application for a rehearing; but as we have none, it is our duty to overrule it.

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Indictment for Larceny of Part of Outstanding Crop.

1. *Indictment; sufficiency of.*—*McDowell v. The State*, ante, p. 172, followed as to the sufficiency of an indictment which, for want of a specific allegation as to the time of the commission of the offense, does not disclose affirmatively that the act charged, was done subsequent to the passage of a statute making it a punishable offense.

2. *Arrest of judgment; what not ground for.*—Judgment will not be arrested, because the christian name of the owner of the stolen property was designated by initials only, instead of being given in full; especially where the prosecutor wrote his name as set forth in the indictment, and was as well known when designated in that way, as when his christian name was given in full.

3. *Larceny of part of outstanding crop; proof, what necessary to constitute.* One hired to pick cotton, who after gathering it converts it to his own use, can not be convicted of the statutory offense of "larceny of part of outstanding crop," unless at the time of gathering it, he had the present felonious intent to steal it; and where he had the right to retain possession, until the cotton was weighed at the close of the day, the mere fact that after picking the cotton he secreted it, will not of itself justify the finding that he had the felonious intent to steal it, at the time he was picking it.

APPEAL from Perry Circuit Court.

Tried before Hon. GEORGE H. CRAIG.

The appellant was convicted under an indictment found on the 22d day of March, 1878, which charged that he "feloniously took and carried away, twenty pounds of cotton, a part of an outstanding crop of cotton, the property of B. A. Rush," &c.

On the trial, the State introduced one Benjamin A. Rush, who testified that he was the person named in the indictment, as the owner of the property alleged to have been stolen, and he was known as Ben or B. A. Rush, and that he signed his name B. A. Rush. This witness testified that he employed the defendant to pick cotton for him, and agreed to give him a certain amount per hundred pounds—the cotton so picked to be weighed at the close of each day, and to remain in the possession of the defendant until weighed; that under said contract or agreement the defendant picked cotton one entire day, in the field of the witness, and that about 11 o'clock of said day, the father of defendant, who was at the time picking cotton with him, and with other hands for witness, asked witness, in the presence of the de-

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fendant, if he and defendant could go to another part of said cotton field and pick, to which witness consented, and defendant and his father went to pick in the place mentioned, which was near a skirt of woods, and near the house where the defendant lived, and that no one else was picking cotton at or near this place. This witness rode up to the place where defendant was picking, and when within about one hundred yards, saw defendant, who had filled the sack he was picking in, go with it out of the field into the skirt of woods, and the witness did not see defendant after he entered the woods, but soon after saw him get over the fence near the house where he lived, and soon after defendant returned with the sack empty, and continued to pick cotton during the remainder of said day, and all this occurred in Perry county, and within twelve months before the finding of this indictment. The defendant introduced his father, Henry Lyon, as a witness, who testified that he picked cotton with defendant all day, and that he did not see him take any cotton from the field. The defendant also proved a good character for honesty. Rush being recalled by the State testified that he knew the character of Henry Lyon, and that he would not believe him on oath. This was substantially all the testimony.

The court, of its own motion, charged the jury, that "if the evidence in the case satisfied them, beyond a reasonable doubt, that the defendant feloniously took and carried away cotton, a part of an outstanding crop of cotton, the property of B. A. Rush, with the intention of converting said cotton to his own use or depriving the owner of it, in Perry county, and before the finding of the indictment in this case, then the defendant would be guilty as charged in the indictment; that the fact that he was employed to pick the cotton for B. A. Rush, would not excuse him, if he had the intention to steal it while severing from the stalk or picking it, and with such intention did pick said cotton and feloniously take and carry it away, with the intention to convert it to his own use or deprive the owner of it."

The defendant requested separately the following written charges: 1st. "If the jury believe that the defendant came legally into the possession of the cotton alleged in the indictment to have been stolen, they must acquit the defendant." 2d. "If the jury believe the evidence, the defendant had the right to pick the cotton and take it into possession; and if he had the right to pick it and take it into possession, then the cotton ceased to be a part of the outstanding crop, and

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the defendant can not be convicted of the larceny of a part of an outstanding crop of cotton under this indictment." 3d. "If the defendant had the right to pick the cotton and take it into possession, and if at the time of the picking and taking into possession, he had no intent to steal the cotton, and such intent arose after that time, then the defendant can not be guilty of larceny, but may be of embezzlement." 4. "If the jury believe from the evidence that the defendant came into possession of the cotton alleged to have been stolen by him, by virtue of his employment, the jury can not convict him." 5. "If the jury believe from the evidence that Mr. Rush employed this defendant to pick cotton for him, and agreed to give him so much per hundred, and this defendant took a part of the said cotton before it was weighed, he can not be convicted of larceny." 6. "If the jury believe that the christian name of Mr. Rush is Benjamin, there is a fatal variance between the indictment and the proof, and the jury can not convict the defendant." 7. "That the cotton was no longer a part of an outstanding crop after it had been picked, and if the intent to steal was formed after the severance, the jury must return a verdict of 'not guilty;' for in such case the offense was not grand larceny as charged in the indictment."

The court refused to give each of said charges, and the defendant separately excepted to each refusal.

After conviction, the defendant moved in arrest of judgment—1. "Because the indictment in this case alleges that the offense therein described was committed before the finding thereof, but does not show that said offense was committed after the act entitled 'An act to amend section 3706 of the Revised Code of Alabama,' approved February 20, 1875, became the law of this State." 2. "For aught that appears in and by said indictment this defendant may have taken the property therein described before the said act went into force and effect, and became the law of this State." 3. "That the property therein alleged to have been taken, is not described with sufficient certainty." 4. "That said indictment does not set forth the christian name of the owner of the property therein alleged to have been taken, or show that it was to the grand jury unknown."

The court overruled the motion, and sentenced the defendant to two years hard labor for the county.

E. M. VARY, for appellant.—The indictment is fatally defective, because it fails to allege the time when the de-

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defendant committed the alleged offense. The defendant was indicted for the larceny of part of a growing crop, which offense was created and made grand larceny and a felony by the act of March 20, 1875. Prior to that time, the severing and carrying off of a part of the outstanding crop was a mere trespass, and this act became the law of this State thirty days after the adjournment of the legislature which enacted it, to-wit, on the 22d day of April, 1875. At common law it was necessary to allege the time at which or within which the offense was committed.—Clarke's Manual, § 2180, and authorities cited; Bishop Crim. Procedure, vol. 1, § 239, *et seq.* Under the statute, it is not generally necessary to allege the time, but the offense may be alleged to have been committed on any day before the finding of the indictment, or generally before the finding of the indictment.—Code of 1876, § 4788. It has been decided by this court that an indictment for a misdemeanor, not alleging the time within which the offense was committed, is *in legal effect* a charge that the offense was committed within twelve months before the indictment was found; or, in other words, it covers the entire time, previous to the finding of the indictment, not within the bar of the statute of limitations, and if the law under which the indictment is found has been in force for a period of time less than the time necessary to perfect the bar of the statute, the indictment is bad.—See 55 Ala. 167; 24 Ala. 672. There is no limitation of time within which a prosecution may be commenced for grand larceny.—Code of 1876, § 4640. Under these principles an indictment like the present, is bad; for it is, in legal effect, a charge that the offense was committed at any time within the life of defendant; and the law under which the indictment is found, has only existed since the 22d of April, 1875. Prior to that time the offense charged did not exist. The owner of the property should have been described in the indictment by his christian name. Such was the rule of the common law, and there is no statute changing the common law in this respect. The case of *Thompson v. State*, 48 Ala. 165, is opposed to rules of common law, and the preponderance of judicial authority, is calculated to induce negligence and carelessness, and should be overruled.—See 53 Ala. 476; Pomeroy's Archbold, vol. 1, p. 245. Charge number seven should have been given. After the cotton was severed, it ceased to be part of an outstanding crop; and if the intent to steal it, was formed after the severance, the offense could not be grand larceny.—See 55 Ala. 116; 54 Ala. 238; 53

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Ala. 474. The appellant had the right to the possession of the cotton, until it was weighed; until that time the alleged owner had no right to the possession, and it is immaterial whether the defendant kept the cotton in the field or carried it to his house. The defendant came into the possession of the cotton by virtue of his employment, and was in the legal possession of it at the time of the alleged taking; and there is no proof that he failed to deliver all he picked at the close of the day, as required by his contract. The evidence shows a bailment, and the defendant could not be guilty of the offense charged in the indictment.

H. C. TOMPKINS, Attorney-General, *contra*.—The case of *Molett v. State*, 33 Ala. 409, settles adversely to appellant the objection that the indictment failed to allege the time of the commission of the offense. The point as to the sufficiency of the designation of the owner of the property, by his christian name, was fully considered and decided in the case of *Franklin v. State*, 52 Ala. 414. It was there ruled that the initials were sufficient. The defendant's offense, if any thing, was larceny. He could not have been convicted of embezzlement upon the facts. He had no property in the cotton, either general or special; nor did he have the use of it. It was, while in the field, in the possession of Mr. Rush, and defendant was a mere servant, to pick and convey it from the field to the cotton-house. It remained in the constructive possession of the owner, during the whole time. *State v. Self*, 1 Bay, 242; 2 Bish. Crim. Law, 818, 837; 33 Ala. 416.

MANNING, J.—It is charged in this cause, that "before the finding of this indictment," defendant "feloniously took and carried away twenty pounds of cotton, a part of an outstanding crop of cotton, the property of B. A. Rush," &c.

The first ground upon which the motion in arrest of judgment is based—the omission of a limitation to the time, when the offense is alleged to have been committed, to a period subsequent to the enactment of the law creating it—was the subject of consideration in the case of *McDowell v. The State*, *ante* p. 172. And on the authority of that case, we hold the reason assigned insufficient to support the motion.

Nor, under the practice now established and which this court has recognized, though often reprehending it, can we hold that the motion to arrest ought to have prevailed because the christian name of the owner of the cotton involved, was

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not set out entire instead of by initials; it being proved that he commonly wrote his name B. A. Rush, and was known by it as well as by the name of Benjamin A. Rush.—*Thompson v. State*, 48 Ala. 165; *Morningstar v. State*, 52 Ala. 407; *Franklin v. The State*, *id.* 414; *Gerrish v. State*, 53 Ala. 480. In this last case, in reference to the accused himself, as distinguished from one not a party to the cause, we said: "However proper it may be in the hurry of daily life, and unimportant occasions, to write one's own name or the names of others, in the shortest intelligible manner, it is not allowable to do so, in so grave and solemn an instrument, as an indictment by a grand jury under oath, which denounces the person denominated in it as a violator of the law, with the intent to have him sought out from the rest of the community and arrested and brought to punishment. And solicitors and grand jurors ought to be diligent to find out and insert in their indictments the true names of those whom they thereby accuse," (p. 480). It often happens that there are in a community more persons than one of the same surname and whose christian or baptismal names, though different, begin with the same initial letters. And much undeserved reproach and cruel injury might be inflicted, especially after a generation had passed, upon the family of one, by the fact that another of them, had been indicted and convicted of larceny, perjury or some other heinous crime, by a surname and initials which equally well described both. Such evil was prevented by the common law practice of designating the person accused in the indictment, by his place of residence, occupation and station in society, as well as by his true and entire name, when this could be ascertained. And since the former particulars are not now required, and are rarely used, it is only the more important that a grand jury should, in the words of their oath, "diligently inquire" concerning the true christian name of a person to be presented as a criminal, before they indict him by initial letters, because "his name is unknown to" them. The statute says the indictment "must be certain as to the person charged;" and it is a duty to take pains to make it so.—Code of 1876, § 4786 (4113).

The prosecution is under the statute which makes the felonious taking and carrying away of a part of an outstanding crop of cotton, grand larceny; a law designed to repress an offense which had recently become so common and mischievous as greatly to discourage people engaged in agriculture. The defendant was employed to pick cotton from the

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stalk by Mr. Rush, at a certain price per hundred pounds, and was entitled to keep together, the cotton so picked until the close of the day, when it was to be weighed. Having filled the sack into which he put the cotton as he picked it, defendant was seen to go from the field and carry it away to his father's house, about eleven o'clock in the day; and it is on this fact, (omitting circumstances proved), that the charge is founded.

We have heretofore held that inasmuch as the parts of an outstanding crop savor of the realty, instead of being personal chattels—a defendant can not under an indictment like the present, be convicted of petit larceny. And in his excellent argument, counsel for defendant in this cause, insists that since the cotton was picked from the stalk, in the course of defendant's employment to pick it, by the express authority of Rush, the owner, the offense could not have been committed in respect of such cotton,—and that if any offense was committed it was by the taking away of the cotton after its severance and when it had become personalty, for which there could be no punishment under this indictment.

It is true the act complained of was not a trespass, in the ordinary meaning of that word, and that generally larceny is committed by a trespass. In some cases, though, this is not so. In those of bailment, especially, goods of another may be lawfully obtained in bulk or packages for a particular purpose, as for transportation by a carrier, and yet the bailee be guilty of larceny, by separating portions of them from the rest, and disposing of them for his own use. So, one may apply to a keeper of horses to obtain one on hire, and have the horse delivered to him by the owner; still, if the pretended hirer, intended *ab origine*, to get the animal for the purpose of selling him and depriving the owner of his property, and does so soon afterwards, he is guilty of larceny. Though no trespass was committed and he received the horse from the hands of the owner, yet if he contrived so to get him, *animo furandi*, the taking and carrying away were felonious. And the perfidity of his conduct after getting the horse, coupled with his knowledge of the ownership, is evidence of an intention to steal from the beginning.

We think such a case, and one like the present, may stand upon the same principle. Deception and treachery may be practised in each. In one there is a severance from the realty, which is the taking that must be felonious, if any is, and in the other the taking of a horse,—both, by the authority and with the consent of the owner. Now, if in the former case

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the accused himself or by others, contrived to get himself hired to pick cotton with the felonious intent of gathering it and taking it away for his own use, and collected it from the bolls in which it grew, with that intent, and appropriated it to his own benefit or that of another, and thus deprived the owner of it, he would, in our opinion, be guilty of the crime charged in this indictment, just as the hirer of the horse who obtained him by pretending to want him for only a short ride, and then sold him, would be guilty of larceny.

It is obvious, however, that the testimony should clearly tend, in such a case as the present, to show that there was a felonious design existing when defendant engaged himself to pick the cotton, which was afterwards carried into effect, of gathering it and against the will of the owner appropriating it to his own or some other person's use. For the law presumes that one who has been not only authorized, but employed to gather the cotton of another, and promised a reward for doing so, is honestly performing his engagements. And something more than the single fact, that in the course of the day, he afterwards took away and secreted, if he did do so, cotton which he had been gathering and which had thereby become personalty, is necessary to show that he picked it from the bolls with that intent. Such evidence might tend to prove larceny of the cotton after it was gathered; but that is not the offense here charged. And of this offense, the jury should not find defendant guilty, unless by fair inference from testimony tending to show it,—they are convinced beyond a reasonable doubt that he engaged himself to pick the cotton and picked it with the intent then actuating him, of stealing it. If he was guilty only of the larceny of the article taken, as a personal chattel, after its severance from the bolls, the prosecution should be for that offense, and not for the felonious taking and carrying away of a part of an outstanding crop.—See *State v. Chambers*, 6 Ala. p. 856.

There is another feature of this case which was the subject of comment. Defendant was entitled to keep the cotton he picked until the close of the day, and then it was to be weighed. And this led to a discussion of the law of bailment, and embezzlement in connection with this case. But these relate to personal chattels. If appellant was guilty at law under this indictment, he was so in respect of what was done before the cotton was severed from the realty, so as to become personalty that could be carried from the field. And if the contract with Rush was entered into on the part of defendant, merely as a means to enable him to gather the cotton and

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feloniously carry it off, it does not matter what terms or conditions were added concerning things that were to be afterwards done. This right to the possession until the close of the day, was a very proper topic of argument before the jury, in explaining away what might appear to be criminal in the act of carrying the cotton out of the field, when that was relied on as evidence of an intent to steal in the first instance—but does not require consideration from us.

We have already mentioned that the felonious intent must have accompanied the act of gathering the cotton, in order to justify a conviction of defendant on this indictment. This proposition was embodied in the seventh of the charges asked by defendant and refused by the court. In this refusal the circuit judge erred. The other charges requested, or most of them, needed some qualification, of a kind indicated in this opinion, to prevent the jury from being misled by them, and were therefore properly refused.

Let the judgment of the Circuit Court be reversed and the cause remanded.

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Real Action in the nature of Ejectment.

1. *Corporate existence; when can not be denied.*—In general, whoever contracts with a corporation, in the use of corporate powers and franchises, and within the scope of such powers, is estopped from denying the corporate existence, or inquiring into the regularity of the corporate organization, when an enforcement of the contract, or a right arising under it, is sought.

2. *General incorporation laws construed.*—The general incorporation laws in force in September, 1871, authorized the formation of a corporation “to purchase, hold and convey real estate; to loan money thereon to the members of the association for building purposes,” &c.; and the declaratory act of March 3d, 1870, with reference to building and loan associations, did not abridge the capacity conferred on them, when incorporated under the general law, of taking, holding, disposing of or conveying, by lease or fee, real estate so far as limited by its charter, or as its business might require.

3. *Same; effect of “An act supplementary to the corporation laws of Alabama,” approved Nov. 18th, 1868.*—The “act supplementary to the corporation laws of Alabama,” approved November 18th, 1868, necessarily repealed all former statutes for the formation of corporations under general laws;

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and after its passage every original application or declaration for incorporation, was required to be filed in the office of the Secretary of State; and a copy duly certified by that officer, is legal evidence of the incorporation.

4. *Conveyance of husband's homestead, requisites of.*—Prior to the act of April 28d, 1873, the husband's conveyance of his homestead, joined in by the wife, and witnessed or acknowledged in the manner requisite to pass the wife's real estate, was sufficient; after the passage of that act, such conveyance would not pass the homestead, unless the requirements of the statute were substantially pursued.

5. *Same; defective acknowledgment and certificate to wife's assent, how may be cured.*—Where the wife's signature and assent to the conveyance of the homestead have been defectively acknowledged and certified, she may make a new acknowledgment, with the intent to cure the defect, and such acknowledgment, when properly made and certified, will relate back, rights of third persons not intervening, to the date of the original delivery of the conveyance, without any new delivery.

6. *Notary's certificate; how can not be impeached.*—A notary's certificate to such conveyance, in the form prescribed by statute, can not be impeached, without showing that the wife's signature was forged, or that she was subject to duress, or that fraud was practiced on her, with knowledge of the grantee.

APPEALS from Circuit Court of Mobile.

Tried before Hon. H. T. TOULMIN.

These cases involved the same questions, and were argued and submitted together.

Cahall v. Citizens Mutual Building Association.

This was a real action in the nature of ejectment brought by the appellee, "The Citizens Mutual Building Association," a domestic corporation, against the appellant, Green B. Cahall, to recover certain premises in the city of Mobile. The case was tried on the pleas of *nul tiel* corporation, and the general issue, and resulted in verdict and judgment for the plaintiff.

On the trial, the plaintiff offered in evidence for the purpose of proving its incorporation, a duly certified copy of the following

"CHARTER:

"*Declaration for the formation of an Incorporated Company under the provisions of the Statute Laws of Alabama relating to Private Corporations.*

"We the undersigned citizens of Alabama, being desirous of forming a building association and of constituting a body corporate, do make this declaration:

"1. The name and style of this company shall be the 'Citizens Mutual Building Association.'

"2. The purposes and objects of the association are hereby declared to be—to purchase, hold and convey real estate; to loan money thereon to members of the association for build-

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ing purposes, to be secured by a lien on the land and buildings; to rent and dispose of such property when acquired, in such form and manner as by the by-laws of the association may be provided.

"3. The capital stock of the association shall be two hundred thousand (200,000) dollars, and shall be divided into four hundred shares of five hundred dollars each. Upon every share of stock subscribed, there shall be paid five dollars as an entrance fee, and five dollars on the first Monday of every month thereafter, until the dissolution of the association, and every member shall be liable on the books of the association for the value of his share or shares subscribed.

"4. The fund thus created, and all accumulations arising from the conduct of the business of the association, shall be applied as provided in the second section hereof, and the association shall proceed to active operations when one hundred shares of the capital stock are subscribed, and the first assessment paid in.

"5. When a lot shall have been purchased with a house built thereon, for every share of stock, or a just equivalent thereto, this association shall be dissolved, and there shall then be an account and settlement of the affairs of the association, with a just division of all the profits and assets, among the shareholders. Provided that a dissolution may be sooner effected by a vote of two-thirds of the shareholders at a meeting held after publication for thirty days in some newspaper published in Mobile, setting forth the object of the meeting.

"6. The association shall have full power to pass all such by-laws, rules and regulations, as may be deemed necessary for the interests and good government thereof, where the same do not conflict with the laws of the State or of the United States; and to alter and amend such by-laws, rules and regulations at pleasure; to have and to use a common seal, and to enjoy such immunities, franchises, privileges and powers in the furtherance of the interests of said association as are guaranteed by the law of Alabama to other corporations of a similar character."

Here follows the signatures of the corporators, and the number of shares held by them respectively.

Appended was the following certificate:

"STATE OF ALABAMA, MOBILE COUNTY.

"I, Harry Pillans, a notary public in and for said county and State, hereby certify that Alfred Goldthwaite, E. M. Underhill, [and so on, naming each one until the names of

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subscribers to a hundred shares of stock] whose names are signed to the foregoing declaration as stockholders of the number of shares set opposite each name, and all of whom are known to me, acknowledged before me on this day that being informed of the contents of said declaration, they signed and executed the same, setting opposite their names the number of shares of stock held by each, voluntarily on this day. Given under my hand and notarial seal, this 21st day of September, A. D. 1871.

"[Seal.] HARRY PILLANS, Notary Public M. C."
Then follows this certificate:

"STATE OF ALABAMA, MOBILE COUNTY.

"I, S. G. Stone, clerk of the Probate Court of Mobile county, do hereby certify that the foregoing declaration was this day presented in said court and duly filed according to law.

"In testimony whereof, witness my hand this 21st day of September, A. D. 1871. S. G. STONE, Clerk."

This was followed by this certificate:

"STATE OF ALABAMA,
SECRETARY OF STATE'S OFFICE,
September 23d, A. D. 1871. }

"I hereby certify that the above is a true copy of the original roll now on file in this office.

"[Seal.]

"[Stamp.]

J. J. PARKER,
Secretary of State."

Finally the following:

"Received in office for record September 26th, 1871: I hereby certify that the within instrument is duly recorded in Miscellaneous Book H., pp. 346, 348, 349 and 350.

"G. HORTON, Judge.

"Attest: S. G. STONE, Clerk."

Due organization under this charter was shown.

The "defendant objected to the admission of said paper writing in evidence, but his objection was overruled, and he excepted."

The plaintiff then offered in evidence a warranty deed executed by defendant, and his wife, Jane, and the endorsements thereon, whereby in consideration of the sum of twelve hundred dollars, they duly conveyed the premises in controversy to the plaintiff in its corporate name. This deed was dated May 20, 1873, and was signed by both husband and wife, but not attested by witnesses. On the same day they acknowledged its execution before Alfred Goldthwaite, a notary public, who certified it in the form prescribed by

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the Code. The deed was duly recorded May 6th, 1879. Appended to the deed was also the following certificate:

"STATE OF ALABAMA, MOBILE COUNTY.

"I, Alfred Goldthwaite, a notary public for Mobile county, hereby certify that on the 20th day of June, 1874, came before me the within named M. J. Cahall, known to me to be the wife of the within named G. B. Cahall, who being by me examined separate and apart from her husband, touching the signature to the within deed, acknowledged that she signed the same of her own free will and accord, and without fear, constraint or persuasion of her husband. In witness whereof I have hereunto set my hand this 20th day of June, 1874.

"ALFRED GOLDTHWAITE, N. P. M. C."

This acknowledgment was subsequently recorded. "The defendant objected to the admission of the deed, with the last acknowledgment of said Martha Jane Cahall along with it." This objection was overruled and the defendant excepted.

Goldthwaite testified that he was a stockholder in the association, chairman of the real estate committee, legal adviser as to titles, and that when he took the first acknowledgment "he was ignorant of the passage of the act of April 23d, 1873; that in June, 1874, after consultation with the president of the association, he called on Mrs. Cahall, informed her of the defective acknowledgment, showed her the deed, and asked if he had read the deed over to her when she signed it, and interrogated her at length about her signature, and she acknowledged it." The defendant then objected to the admission of the deed, on the ground that "the proof does not show that the deed is valid, and because the plaintiff had no authority by law to take such a deed." This objection was overruled, and defendant excepted.

The proof shows that the premises in controversy were not worth \$2,000, and were at the time of the trial and had been continuously for eighteen years past, the homestead of appellant, Cahall, on which he and his family resided at the date of both acknowledgments. Cahall became a member of the association after its organization, by buying stock, and obtained about \$1,250 from it, which was not the full value of the premises.

Mrs. Cahall testified that Goldthwaite did not show her the deed when he called in June, 1874; that she was not conscious that the effect of what she was doing was to make a new deed; that neither she nor her husband sent for Gold-

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thwaite the second time, or gave any assent to the deed at that time.

The by-laws of the association were offered in evidence, one of which reads as follows :

“In case of any shareholder becoming entitled by lot to the benefit of the fund, owns a lot on which he desires to build, the association shall build thereon for him such a house as he may desire to the amount of two thousand dollars—any excess to be furnished by him. Provided, he shall execute to the association a trust deed of such lot, conditioned that he shall pay to the association an annual rent, payable monthly, of fifteen per cent. upon the amount expended by the association ; and for the payment of all taxes, and for repairs, with power to the association to enter upon and sell for their security for the rents and fines in arrear, after three months, as specified in the foregoing section. And such shareholder shall have the right at any time to pay to the association the amount expended on such house, and to receive the title to the same at once.”

Cahall testified that he had never executed any lease to the association, and was never asked for any, until just before the present suit was brought.

The defendant requested written charges at great length, as to the nature of building and loan associations, their objects and powers ; as to contracts *ultra vires* ; as to the formalities requisite to convey the homestead of a married man. These charges asserted, in substance, that the deed relied on was void ; that its second acknowledgment was invalid ; that the corporation, plaintiff, was not legally organized ; that it had no power to acquire lands by a deed like the present. All of these charges were refused by the court, and the defendant excepted. The various rulings to which exception was reserved are now assigned as error.

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This case was also a real action in the nature of ejectment, brought by the appellee against the appellant Pond.

The plaintiff relied on a deed from Pond and wife, conveying, for valuable consideration, the premises in controversy directly to plaintiff in its corporate name. This deed was properly executed and acknowledged on the 10th day of January, 1872, and Pond was then a stockholder and member of the association. The same objections were raised in this, as in the preceding case, as to the corporate existence

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of the plaintiff, and defense was also attempted on the ground that the contract evidenced by the deed was *ultra vires*.

The court charged the jury "that the execution of the deed to the plaintiff by its corporate name, is an admission of the fact of the corporate existence of plaintiff, and is *prima facie* evidence of the existence of the charter of the company and user under it; that the operations of the plaintiff under it, though they might be inconsistent with the purposes of the charter and power conferred by it, were not grounds of defense in this suit, though they might furnish ground for the forfeiture of the charter, in a direct proceeding.

Exception was reserved to this charge, as also to the refusal to give written charges requested, and of similar purport as those asked and refused in the preceding case.

These rulings are assigned as error.

ALEX. MCKINSTRY, and JOHN ELLIOTT, appeared for the appellant in both cases.—The following provisions with reference to the formation of corporations under the general law, besides those contained in the Revised Code, are material to the decision of this case.—Act of August 12th, 1868, Acts p. 34; Act supplementary to the corporation laws of Alabama, approved November 18th, 1868. It is apparent that in the effort to incorporate the Citizens Mutual Building Association, there was a failure to comply with the requirements of the Revised Code of Alabama above cited. Their declaration of incorporation was not filed and recorded in the office of the judge of probate in which their business was to be carried on, as required by the Code of 1867; and if it be held, the recording of a copy from the Secretary of State's office is a substantial compliance with said section 1756, then it is contended that the said declaration is not authenticated for the purposes of proof, as required by section 1761 of the Revised Code of 1867, cited above.

The declaration is also substantially defective in this, that the names of the stockholders and the number of shares held by each are not set out in the declaration, as required by subdivision three of section 1755, of the Code of 1867, above cited.

The declaration is nothing more than a subscription paper for one hundred shares of stock, leaving three hundred shares unowned and to be disposed of after incorporation. The condition upon which the State, by the operation of general laws, confers the franchise of incorporation in cases of this kind, is that the stockholders of the corporation shall be

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liable for all debts due by it at the time of its dissolution, to the extent of their stock.—Revised Code, 1867, § 1760. Stockholders, becoming such by the purchase of fresh stock after the incorporation was effected, would not be parties to the contract with the State and be bound by the condition. Hence it would seem an essential preliminary to incorporation, that all the stock should be subscribed, so that the names of the stockholders and the number of shares held by each may be set out in the declaration. Only the stockholders participating in the incorporation, by signing the declaration and thus acknowledging themselves holders of the stock, could be held to individual liability for the debts of the corporation on its dissolution. Of course the transferees of stock on the books of the company—Code of Alabama, 1867, § 1758—as to this liability, would stand in the place of original holders.

Another objection that appears fatal to the appellees' claim to incorporation, is that there is no law authorizing the formation of corporations for such purposes and with such powers. The enterprise announced in the declaration is a general traffic in real estate, and the achievement contemplated as the end of their operations is the purchase of four hundred lots, with houses built on them, to be divided among the stockholders.—See sections 4 and 5 of the declaration, *supra*. By our laws corporations are forbidden to purchase, dispose of and convey real estate, except as needful to some other and main business.—Rev. Code, § 1767, subd. 4. The fact that the appellees called themselves a building association, and that the law authorizes the formation of such corporations, does not entitle them to engage in the business of dealing in real estate, or to exercise the powers assumed in their declaration. The objects and powers of building and loan associations had, when the appellees undertook to form themselves into a corporation, been already declared by statute approved March 3d, 1870.

Any material omission in the steps prescribed as conditions precedent to the existence of corporate power, will be fatal, and may be taken advantage of collaterally; otherwise as to conditions subsequent which concern only the government, and can be taken advantage of no where except in a direct proceeding.—*McKelumme v. Woodbury*, 14 Cal. 424; *Harris v. McGregor*, 29 Cal. 124; *Carey v. C. & C. Railroad*, 5 Iowa (Clarke), 359.

The deed of Cahall was absolutely void when made. The acknowledgment and delivery then made were nullities. There was no subsequent delivery, after the pretended ac-

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knowledge before Goldthwaite. He was without authority to make or certify it. The by-laws, which confine the charter powers which are to be exercised in the manner provided by the by-laws, did not confer authority on the corporation to take or hold land under a deed like the present, even if it be valid.

HANNIS TAYLOR, and TAYLOR & MCCARTNEY, *contra*. The objection to the admissibility of the articles of incorporation, depends upon the effect of sections 1756-57 of the Revised Code, when construed with reference to the "act supplementary to the corporation laws of Alabama." At the date of this incorporation, September, 1871, these provisions were the only ones which applied to the *method* in which these declarations should be filed. By these sections of the Code it was provided that these declarations should be filed and recorded in the Probate Court of the county, after acknowledgment, &c.; and by the doing of these acts the incorporation was complete. But the supplementary act, approved November 18th, 1868, changed the whole system, by providing that the application should be made to the Secretary of State, and, as soon as a certified copy of the same could be filed in that office, the incorporation should be complete. All conflicting laws are repealed by this act, which must necessarily have suspended the sections 1756-57 of the Code which directly conflicted with the act, because it would have been impossible to have made two original applications at the same time over the same subject-matter. Now, there can be no dispute about the declaration in this case complying with the exact terms of the acts of 1868. But it is contended that in compliance with the Code it should have been filed and recorded in the Probate Court of Mobile county, before it was offered for enrollment in the Secretary's office. The clerk of the Probate Court certifies, on the 21st of September, 1871, that the declaration was "duly filed according to law" on that day in that court. This certificate does not affirmatively state that it was recorded, but there is no evidence that it was not recorded. So the court must presume that this was done, if it was necessary, because the certificate states that it was filed "according to law." Every court indulges in all reasonable presumptions in favor of official propriety, and in the absence of evidence to the contrary will always presume that a public officer did his duty.

It has been expressly held that minor informalities in the organization of these corporations, under general laws, will

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not invalidate, provided the statute be substantially complied with.—*Rogers v. Danby Universalist Society*, 19 Vt. p. 187.

So it is plain that both sets of regulations were complied with, and that the informality, if existing, is too minor in its character to invalidate the proceedings.

2. The defendant is estopped by two facts from denying the existence of the corporation. First, it was expressly proven that he was a member of the corporation; second, that he contracted with it by making a deed to it in its corporate name. That these two things expressly estop a man from denying the existence of a corporation is common learning. *Abbott's Digest Law of Corp.* pp. 331 and 333; *Eaton et al. v. Aspinwall*, 19 N. Y. p. 119; *Methodist Episcopal Church v. Pickett*, 19 N. A. p. 484; *Bigelow on Estoppel*, 424; 5 Otto, 667; 4 Otto, 104.

So every charge based upon the idea of the nullity of the corporation, *as to the defendant*, on account of informalities, was properly refused.

3. Rights of third parties have not intervened here, and as to the parties to the deed it has long been settled that its subsequent acknowledgment, made to cure a defective execution, will relate back to the day of its original date.—*Hendon v. White*, 52 Ala. 597, and authorities there cited.

4. The other objections as to the internal workings of the corporation could not be secured in ejectment. The defendant can not keep the money and insist on his plea of *ultra vires*.—*Abbott on Corp.* p. 25, §§ 305–8. The case of *Miller v. Marx*, 55 Ala. disposes of the other objections.

BRICKELL, C. J.—These causes, involving the same questions, were argued and submitted together. The assignments of error, relating to the admission of evidence, the giving and refusal of instructions to the jury, present the same questions—the corporate existence of the appellee, its capacity to hold real estate otherwise than by way of mortgage, or as security for debt, and the sufficiency of the conveyance under which the appellee deduces title to the premises in controversy, to pass the homestead of the grantor.

The conveyance is made directly to the appellant by its corporate name. The general rule is, that whoever contracts with a corporation, in the use of corporate powers and franchises, and within the scope of such powers, is estopped from denying the existence of the corporation, or inquiring into the regularity of the corporate organization, when an enforcement of the contract, or of rights arising under it, is sought.

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Mont. R. R. Co. v. Hurst, 9 Ala. 513; *Marion Savings Bank v. Dunkin*, 54 Ala. 471; *Lehman, Durr & Co. v. Warner*, in manuscript. The appellant concedes this rule, but insists that it can not be applied to a corporation formed under the provisions of a general statute, requiring certain acts to be done before the corporation can be regarded as in existence, and capable of exercising corporate power. Whatever acts the general statute requires should precede incorporation, the argument is, must be shown affirmatively by the appellee, under the plea of *nul tiel corporation*, or it can not maintain a standing in court. How far in this respect, a distinction can be drawn between a corporation deriving its existence and powers under a special legislative enactment, and a corporation formed under a general enactment, the case does not require us to decide.

The declaration for the formation of this corporation, signed by the corporators, and which became its charter, recites the title of the corporation, the purposes and objects for which it was formed, the amount of its capital stock, the number of shares into which it was divided, the value of each share, and the time of payment by each shareholder of the capital stock, of the amount he had subscribed. The second section or article of the declaration is in these words: "The purposes and objects of the association are hereby declared to be, to purchase, hold and convey real estate; to loan money thereon to members of the association for building purposes, to be secured by a lien on the land and buildings; to rent and dispose of such property when acquired, in such form and manner as by the by-laws of the association may be provided." The fourth section, among other things, provides that the association may proceed to active operations when one hundred shares of the capital stock are subscribed and the first assessment paid. The declaration was signed by subscribers for one hundred shares of the stock, acknowledged by the subscribers before a notary public, who duly certified the same, filed in the office of the judge of probate on the 21st day of September, 1871, in the office of the Secretary of State on the 23d day of September, 1871, and a certified copy recorded in the office of the judge of probate on the 26th day of September, 1871.

It was said there was no law then of force authorizing the formation of a corporation for the purposes and with the powers expressed in the second article of the declaration. The Code of 1867, § 1755, expressly authorized the formation and incorporation of building and loan associations, and as

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amended by the act of March 3d, 1870, it extended not only to building and loan associations, but to an association for any lawful enterprise, not inconsistent with the constitution and laws of this State.—Pamph. Acts, 1869–70, 308. The formation of corporations under general laws, rather than by special legislative enactment, has been for a number of years past a favorite public policy, as indicated by constitutional provision and legislative enactment. The constitution of 1868, interdicted the creation of corporations for other than municipal purposes, by special act, and in any other mode than by a general law. When the statute amendatory of section 1755 was enacted, there were general laws authorizing the formation of nearly every kind of private corporations. A manifest purpose of this statute expressed not only in the general terms we have quoted, but in the express exclusion from its operation of *associations for carrying on gift enterprises, lotteries or games of chance of any kind whatever*, was to authorize the incorporation of any association for any lawful business or enterprise. Nor is there any conflict with, or inconsistency between the purposes and objects of this association as expressed in the second section of the declaration, and the provisions of the act of March 3d, 1870, declaratory of the objects, powers, and rights of building and loan associations.—Pamph. Acts 1869–70, p. 444. A power conferred on every private corporation by the statute then existing, was, “to hold, purchase, dispose of, and convey such real estate as is limited by its charter; and if not so limited, such an amount as the business of the corporation requires.” R. C. § 1767. The declaratory act in reference to building and loan associations, does not abridge the capacity conferred by this general statute on them as corporations, when incorporated under the general law, to take, and hold, and dispose of, or convey, by lease for a term, or in fee, real estate, so far as it may be limited by its charter, or as its business may require.

The supposed irregularity in the mode of procedure pursued in the organization of the corporation, is, that the original declaration signed by the stockholders should have been recorded in the office of the judge of probate of the county in which it was proposed to carry on business, and that such record was a condition precedent to corporation existence. The Revised Code of 1867, §§ 1756–7, did require that the declaration should be recorded in the office of the judge of probate, and upon the filing and recording, declared the subscribers became a body corporate, by the name stated therein.

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There were similar provisions in reference to towns, religious, educational, benevolent and burial societies, mining, quarrying, and manufacturing associations, &c. While turnpike, plank, macadamized, and railroad companies, steamship companies and banking associations were required to file the declarations, which became their charters in connection with the general statutes, in the office of the Secretary of State. These statutory regulations existing, requiring as to some corporations that the declaration should be filed in the office of the judge of probate of the county in which the corporation was to be located, and as to others, that it should be filed in the office of the Secretary of State, the act of November 18th, 1868, entitled "An act supplementary to the corporation laws of Alabama," was enacted.—Pamph. Acts 1868, p. 349. The first section requires the application for a charter *under any of the general incorporation laws of this State*, to be filed with the Secretary of State, and that a certified copy shall be retained for record by the officer before whom such application is made. The filing of the certificate with the Secretary of State, constituted the persons named a body corporate. The fourth section requires all corporations previously formed under the general laws, within sixty days after the passage of the act, to file their certificate of incorporation with the Secretary of State. That the legislature intended this statute as a substitute for all former statutes relating to any and every corporation formed under the general laws, whatever was the purpose of its organization, or the business it was to pursue, is manifest. The difference in former regulations, that some corporations must have filed the declaration or application, (for each term, as used in the Revised Code, and in this statute, means the same thing,) in the office of the judge of probate, and some in the office of the Secretary of State, should be obliterated. The office of the Secretary of State was to become and remain the repository of the original of every declaration or application for incorporation under the general laws. When the declaration or application is for incorporation under a general law which had required the filing and recording in the office of the judge of probate, the judge was required to retain a copy certified by the Secretary of State for record. A subsequent affirmative statute revising the subject-matter of former statutes, and intended as a substitute for them, is a repeal of the former statutes, though containing no express words to that effect, it is said upon principles well founded in law, reason, and common sense.—Johnson's Estate, 33 Penn. St.

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511; *Wakefield v. Phelps*, 37 N. H. 295. The act of 1868, not only prescribes a new rule as to the place in which the original declaration of incorporation must be filed, but it extends the rule to the corporations already formed, and in express terms repeals "all acts or parts of acts in conflict with it." We can not doubt that the original declaration of incorporation was properly filed in the office of Secretary of State. The copy certified by the Secretary was properly filed and recorded in the office of the judge of probate. A copy of the declaration certified by the Secretary of State, by the third section of the act of 1868, it is declared shall "be received in all courts and places as the legal evidence of the incorporation of such company."

The constitution of 1868 forbade the mortgage or other alienation of the homestead, by the owner thereof, if a married man, without the voluntary signature and assent of his wife. The construction which this clause of the constitution received, was, that a conveyance of the homestead by the husband to which the wife did not give her voluntary assent and signature was void at law or in equity, and would not support ejectment against the husband, nor operate against a subsequent conveyance, to which the wife did give her assent and signature.—*McGuire v. Van Pelt*, 55 Ala. 344. The mode in which the wife should express her assent, and give her signature to the conveyance of the husband, was not prescribed by the constitution. It was left as a matter of legislative regulation. The act of April 23d, 1873, (Pamph. Acts 1872-3, p. 64,) first declared the mode in which the voluntary assent and signature of the wife must be shown. It was settled by several decisions, that if the conveyance was executed before this statute, and was acknowledged, or its execution proved, and certified, in the mode the statute declared for passing the wife's real estate, the voluntary signature and assent of the wife was sufficiently shown. In this mode the present deed was acknowledged and certified on the second day of May, 1873, in ignorance of the existence of the act of April 23d, 1873. Subsequently, on the 20th June, 1874, the deed was acknowledged before a notary public by the wife, on a privy examination, and certified by him in the form prescribed. The act of April 23d, 1873, conferred on a supreme, or circuit court judge, chancellor or probate judge, authority to take and certify the examination and acknowledgment of the wife. But it was in this respect amended by the act of December 13th, 1873, (Pamph. Acts 1873, p. 53,) and the like authority was conferred on a no-

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tary public, or a justice of the peace. The proposition now relied on by the appellant, is, that as the deed was void in its inception, the subsequent examination and acknowledgment of the wife, can not have relation to the day of its execution, nor could it give the deed validity, unless there had been by the husband (of which there was no evidence) a new delivery of it.

The act of April 23d, 1873, is so far as it declares, the mode in which the assent and signature of the wife to the husband's conveyance of the homestead, is required to be shown, is of the same character as statutes which enable *femes covert* to convey their real estate, or to relinquish their inchoate rights of dower. The mode prescribed by the statute must be substantially pursued, or the conveyance is inoperative. But if the wife joins in the execution of the conveyance of the husband, and it is not acknowledged or certified in the mode the statute prescribes, the defect may be cured by her making a new acknowledgment in proper form, with a knowledge of the defect and the intent to cure it.—Bishop on Mar. Women, § 597. The same rule should be applied to conveyances of the homestead. Neither the constitution, nor the statutes appoint any particular time within which the wife shall give her assent and signature to the conveyance of the husband, nor does the statute appoint any particular time in which her privy examination and acknowledgment shall be taken and certified. The delivery of the conveyance by the husband may precede or may be subsequent, or cotemporaneous with the signature and assent of the wife, and her examination and acknowledgment. If it precedes, it is necessarily in its nature, whether so expressed or not, conditional, dependent for its effect and operation on the subsequent signature and assent of the wife, the privy examination, acknowledgment, and certificate by the proper officer. When these are obtained, the delivery becomes absolute, the conveyance is perfect, and has relation, the rights of third persons not having intervened, to the delivery by the husband.—*Johnson v. McGehee*, 1 Ala. 186; *Nelson v. Holly*, 50 Ala. 3; *Hendon v. White*, 52 Ala. 597. The privy examination and acknowledgment of the wife, and the certificate thereof in proper form, made with her knowledge, with the intent to cure the defects of the conveyance, imparted validity to it, and it was operative to pass to the appellant, the premises in controversy.

The certificate of the notary could not be impeached, without showing the signature of the wife was forged, or

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that she was subjected to duress, or that fraud was practiced on her, with the knowledge of the grantee—*Miller v. Marx*, 55 Ala. 322.

The several rulings of the Circuit Court substantially conform to these views, and we find in them no error prejudicial to the appellant. Each judgment must therefore be affirmed.

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Action to Recover for Medical Services.

1. *Principal; how may be bound by acts of unauthorized person.*—A single instance of recognition by the principal, of the unauthorized assumption of agency by a third person—as by payment of the debt contracted—in the absence of any warning, caution or notice to the person dealing with the supposed agent, will bind the principal as to him, for other similar contracts of such person; but the rule applies only to the person thus dealt with.

2. *Custom; what not sufficient to show.*—The mere act or habit of a railroad company, in paying for medical services rendered to employees injured in its service, does not necessarily establish a custom of such business; before it can have that effect, it must be shown to have been so generally known, and so well settled, as to raise the presumption that the services were rendered in reference to it.

APPEAL from Conecuh Circuit Court.

Tried before Hon. JOHN K. HENRY.

The appellee, Dr. A. Jay, jr., brought this action against the appellant, the M. & M. Railway Co., to recover compensation for medical services rendered to one Green Richardson, an employee of the company, who had been injured while in its service. The testimony showed that when said Richardson was hurt, one O'Brien, the supervisor of a portion of the appellant's railroad, was present, and that he requested the appellee to do all that was necessary for the injured man who was an old employee of the company, and it did not want him to suffer for anything. In compliance with this request, the appellee rendered services which were reasonably worth the sum sued for. Dr. Jay testified that after he rendered the services he made out his bill, and had a conversation with Jordan, the superintendent of appellant, and that Jordan refused to pay for said services, but said that it had been the custom of the company to pay for services rendered by phy-

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sicians to employees who had been injured by defendant's cars, but as Richardson had sued the company, it would not pay the bill. Plaintiff then stated to Jordan that he had been employed by the supervisor, O'Brien, who had bound the company for plaintiff's services, to which Jordan replied that he would see O'Brien, and that if O'Brien had obligated the company, it would pay the plaintiff's bill.

The defendant examined one Corry, who testified that he had been the supervisor of a part of defendant's railroad for some years, and that he was now the supervisor of the whole road, and that his duties as such supervisor were confined to the keeping up of the track, road-bed and bridges of the road, and that he did not consider that he had authority to contract with physicians for medical services rendered to hands of the road. He further testified, that O'Brien's general duties and authority, while supervisor, were the same as those of the witness. This witness also testified that he knew of but one instance where the company had paid a similar bill, and that in that case the witness had employed a physician, and told him that he would be responsible personally for his compensation, and would pay himself if the company did not; that the bill was only twenty dollars, and the company voluntarily paid it, and the injured party did not sue the company. This was all the evidence.

The court, of its own motion, charged the jury, "if they believed from the evidence, that previous and up to the rendition of the services of plaintiff, for which suit was brought, it had been the custom of the defendant to pay bills for medical services, rendered by physicians to employees of the defendant, who had been injured by defendant's cars, then they were liable in this suit for the reasonable value of the services rendered by plaintiff to Green Richardson, if he was injured by defendant's cars while in its employ." The appellant duly excepted to this charge. The jury rendered a verdict for plaintiff, and the company bring the case here by appeal, and assign the charge of the court as error.

HERBERT & BUELL, for appellant. — The charge given ignores the necessary elements of a legal custom. All the evidence is set out in the bill of exceptions, and it wholly fails to establish any such custom or usage, as can be looked to in the interpretation of contracts.—See *A. & T. R. R. Co. v. Kidd*, 35 Ala. 22; *Steele v. McTyer's Administrator*, 31 Ala. 676; *Partridge v. Forsyth*, 29 Ala. 200.

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JOHN D. BURNETT, *contra*.—The custom to pay for medical services rendered employees was clearly proved, and the company can not revoke it in this instance. The custom becomes a part of the contract.—See *Lindsay v. Gazzam*, 6 Port. 123; *Ezell v. English*, ib. 311.

STONE, J.—There is a class of cases in which a single act in recognition of agency, will bind the principal for contracts afterwards made by such supposed or assumed agent; as, “when a father pays, without objection, an account contracted by his minor son while attending school at a distance from home, the payment is equivalent to a recognition of the son’s authority to bind him, and will render him liable on a similar account subsequently contracted.”—*McKenzie v. Stevens*, 19 Ala. 691. This rests on the principle that the act of the agent is thus distinctly ratified and admitted; and, there being no warning, caution or notice given to the person thus dealing with the agent, the law treats this as an authority for further dealings with such agent. But the principle extends only to the person, whose prior dealings with the agent have been, in this manner, ratified. Payment to A of an unauthorized account, is no license or authority for similar credit extended by B. The principal may be willing that the agent, actual or assumed, may bind him to A; and payment to A, without objection or notice, is evidence of such willingness. It is not evidence of a willingness to become bound to B. There is no evidence in the present record that the railway company had ever paid a charge, contracted as this was, to Dr. Jay, the plaintiff in this suit. Hence this case does not fall within the principle above stated, and we do not understand counsel as contending that it does.

It is contended for appellee, however, that it was the usage or custom of the Mobile and Montgomery Railway Company to pay for medical services rendered as the proof tends to show these were, and that, therefore, the plaintiff below was entitled to recover in this action. When a custom or usage of trade, such as is here contended for, is proved to exist, and to be general, all persons engaged in such trade or pursuit, are presumed to contract in reference to it, and it thus becomes a part of their contract, unless there is express provision in the contract which repels the inference. But a mere act or habit of a trader is not necessarily enough to establish such custom. To become a usage or custom of trade, and thus to make such custom a part of the law of the case, it must be shown to have been so generally known, so well

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settled, as to raise the presumption that the parties contracted in reference to it.—*Mobile Marine Dock and Mutual Ins. Co. v. McMillan & Sons*, 27 Ala. 77; *Barlow v. Lambert*, 28 Ala. 704; *Fulton Ins. Co. v. Miller*, 23 Ala. 420; *Ala. & Tenn. R. Co. v. Kidd*, 29 Ala. 221; *Austill v. Crawford*, 7 Ala. 335; *West v. Ball*, 12 Ala. 513. In the present case the proof of usage was by no means clear or conclusive. Plaintiff testified the superintendent of the railway company told him, after the services were rendered, “that it had been the custom of the defendant’s company to pay for services rendered by physicians to employees who had been injured by defendant’s cars;” but he gave a reason why the company would not pay the present demand. Corry, a witness for defendant, testified that he was, and for several years had been supervisor of defendant’s railroad—and that as such supervisor he did not consider he had authority to contract with physicians for medical services rendered to hands of the road. He had known of but one instance in which defendant had paid a similar bill, and that was a case of a hand who had been injured by defendant’s cars, and witness had employed a physician to attend him, and told the physician that he, witness, would be personally responsible for his compensation, and would himself pay him, if the company did not; that the bill was only twenty dollars, and the company voluntarily paid it. Plaintiff in this case testified that a former supervisor of defendant’s road had employed him to render the services, for which the present suit was brought, and had told him the company would pay him for such services. It is doubtful if this testimony tends to prove a usage or custom of trade, which enters as an element into contracts supposed to be made in reference to it. The most that could be made of such testimony, in this connection, would be, to submit it to the jury for their inquiry, whether such custom existed, and was so general and known, as to raise the presumption that these parties contracted in reference to it.—*Steele v. McTyer*, 31 Ala. 667. The court erred in the charge to the jury, that “if they believe from the evidence that previous and up to the rendition of the services of plaintiff, for which suit was brought, it had been the custom of defendant to pay bills for medical services rendered by physicians to employees of defendant, who had been injured by defendant’s cars, then they were liable to the plaintiff in this suit for the reasonable value of the services rendered by plaintiff to Green Richardson, if he was injured by defendant’s cars

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while in its employ." The testimony fails to make a case that falls within either of the principles stated above.

The real question in this case is, had O'Brien authority to employ Dr. Jay, and thus bind the railway company? On this point, the testimony of the several witnesses should be weighed by the jury, under appropriate instructions.—*McClung v. Spotswood*, 19 Ala. 165; *Bank of Montgomery v. Plannett*, 37 Ala. 222. Of course, if O'Brien had authority to bind the corporation, either express or implied, and did employ plaintiff, as claimed by him, the company could not afterwards absolve itself from the liability, by reason of the suit for damages brought by Richardson.

Reversed and remanded.

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Trial of Right of Property.

1. *Reexamination of witness; when not error to refuse.*—The reexamination of a witness, at the instance of a party who has already introduced and examined him, that he may repeat his testimony, rests with the discretion of the primary court, and the exercise of that discretion is not revisable.

2. *Charge, what erroneous.*—A charge on the trial of the right of property, between the wife and an execution creditor of the husband, that the possession of husband and wife jointly, is the possession of the husband, is erroneous and properly refused; when the evidence shows the wife had an equitable estate and was a "free-dealer," the law on such a case refers the possession to the title.

APPEAL from the Circuit Court of Escambia.

Tried before the Hon. JOHN K. HENRY.

This was a trial of the right of property, which had been levied on under execution in favor of appellants, against James Dugan, husband of appellee. The property levied on, consisted of a portion of a stock of goods, in a store, which formerly belonged to the husband. At the time of the levy, the store was carried on in the wife's name, and she and her husband together attended to the business. Some time before this, she had been made a free-dealer. There was evidence tending to show that she had purchased the goods with her own moneys, and was in possession of them in her own right; and also evidence tending to show that the goods were the property of the husband.

Appellant requested the following charge in writing: "The

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law presumes that the possession of the wife and the husband jointly, is the possession of the husband; and that when the wife sets up title on herself to such property, it devolves upon her to establish her claim." The court refused the charge and appellants excepted.

During the progress of the trial, appellants reserved an exception to the refusals to allow appellants to reexamine a witness. The facts material to this ruling are sufficiently stated in the opinion. The refusal of the charge, and the refusal to permit the reexamination of the witness, are now assigned as error.

WHITEHEAD & DAVIDSON, for appellant.—It was error to refuse to allow the witness to be recalled. It could not be anticipated what the claimant would testify to. The recall of the witness was a matter of right; and as the court can not see that appellants were not injured, there must be a reversal. The charge should have been given.—5 Ala. 770; 19 Ala. 192.

CREEN, NEVILLE & POSEY, *contra*.—The ruling as to the witness was within the discretion of the presiding judge, and the exercise of that discretion will not be revised. The charge asked was erroneous, when applied to the facts. It assumes a *joint* possession. The evidence upon this point was at least conflicting. The law refers the possession to the title.

BRICKELL, C. J.—A party has a clear legal right to reexamine his witnesses as to matters requiring explanation, or as to new matter, his adversary may have introduced. It is not within the discretion of the court to permit or refuse such examination, and if on a proper application, the right is refused, the refusal would be an error compelling the reversal of a judgment against him. No distinction can be made between the refusal of the right, and the refusal to admit any legal evidence.—1 Whart. Ev. § 572. It is within the discretion of the court to permit or refuse the reexamination as to matters in reference to which the witness has been examined, and the action of the court in this respect is not reversible on error.—1 Whart. Ev. § 574; *Towns v. Riddle*, 2 Ala. 694; *Gayle v. Bishop*, 14 Ala. 552. The witness, as the bill of exceptions states, had been examined by the appellants on his examination in chief, as to the same matters in reference to which it was proposed to reexamine him. So far as is

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shown, the only purpose of a reexamination, was, that he should repeat his former testimony, rendering the conflict between his evidence and that of the appellee the more apparent to the jury. The reexamination for this purpose rested in the discretion of the court below, and the exercise of the discretion is not revisable.

2. Instructions to the jury, given or refused, must be construed in connection with the evidence on which they are based. When personal property was found in possession of husband and wife, the presumption at common law, was of title in the husband, because the wife was incapable of holding property, and of a possession distinct from that of the husband.—*Bell v. Bell*, 37 Ala. 536. But if the property was the equitable separate estate of the wife, the possession was referred to her title, and there was no room for the operation of the presumption of ownership in the husband.—*Newman v. James & Newman*, 12 Ala. 29; *Michan v. Wyatt*, 21 Ala. 813. The universal principle is, that when two persons are in the joint possession of property, the title being in one, the law refers the possession to the title.—*Bragg v. Massie*, 38 Ala. 105. The charge requested ignored the facts tending to show the title to the property rested in the claimant, and that she was a free-dealer, capable of holding property separate from her husband. If the title resided in her, the possession, if it had been shown to be held by her and the husband jointly, would have been referred to the title, and all presumption of title in the husband excluded. The charge requested was properly refused.

Affirmed.

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Unlawful Detainer.

1. *Redemption; confessed judgment, not available to defeat.*—Our statutes prohibit the use of a confessed judgment to a purchaser, who is resisting redemption of the debtor's property sold under judicial process, as well as to a creditor who is seeking to redeem it.

APPEAL from Circuit Court of Autauga.

Tried before Hon. JAMES Q. SMITH.

The appellant, the Mobile Mutual Life Insurance Com-

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pany, brought his action of unlawful detainer, before a justice of the peace, against the appellee, Steele. The justice having decided the case against appellant, it appealed to the Circuit Court.

The admitted facts were as follows: The lands sued for formerly belonged to Steele. They were sold on the 25th day of January, 1877, under a decree in chancery against him. Nunn and Underwood purchased, and thereafter Steele held as their tenant, and refused on due demand to deliver possession. After the sale Nunn obtained two judgments against Steele by confession. On the same day appellant obtained a judgment against Steele by default. On the first day of June, 1877, appellant tendered Nunn and Underwood the amount of their bill, ten per cent. thereon, and all other lawful charges, and offered to credit and did credit its judgment against Steele, with the amount required by law, and offered to do all that the law required, in order to redeem as a judgment-creditor of Steele. Nunn and Underwood refused to allow the redemption, and claimed the right to hold the lands under the judgments Nunn had recovered against Steele by confession, and they credited one of these confessed judgments with the sum which appellant credited on its judgment.

The court charged the jury, if they believed the evidence, to find for the defendant. Exception was duly reserved to this charge, and it is now assigned as error.

WATTS & SONS, and MAC. A. SMITH, for appellant.—The statute intended when a debtor's lands are sold under executions, decrees, &c., that his lands, even after the public sale, should be put up to auction among a certain class of his creditors. Who were to be the bidders at this auction? All persons, who were judgment-creditors at the time of the sale, and all persons who might become *judgment*-creditors of the debtor within two years after the sale, except those who should become such judgment-creditors by collusion with, or by *fraud* or *confession* of the debtor. If he was a judgment-creditor by collusion with, or by fraud or confession of the debtor, he is excluded from the class of bidders. The purchaser, who becomes a judgment-creditor, is authorized to become one of *these bidders*, provided he is not a judgment-creditor by collusion with, or by the fraud or confession of the debtor. The privilege given the purchaser is simply a means of enabling him, if he becomes a proper judgment-creditor to *redeem* from himself as a purchaser;

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and it enables him to retain the lands he has purchased unless some proper judgment-creditor outbids him.

If the words, "subsisting judgment," as used in section 2882, include a judgment by *confession* of the debtor, there is no reason for excluding judgments obtained by the fraud of, or by collusion with the debtor. They would be subsisting judgments binding on the debtor as much so as a judgment by *confession*. Yet judgments by *confession* are placed in the same exception with judgments by the *fraud* of, or by *collusion* of the judgment-debtor. Whilst, it is admitted that the law intended to invite rival bidding for the debtor's property, after it is sold, still the class of bidders is defined so as to exclude all judgments by confession, by fraud of, or by collusion of the debtor.

T. W. SADLER, and C. S. G. DOSTER, *contra*.—Sections 2881 and 2882 of the Code, as to judgment debtors, has one purpose in common, which is to provide a remedy to prevent the sacrifice of their property sold under execution. Both sections provide means for making such property bring the best attainable price. The common object of both sections is to bring about a *rivalry* of *bidders*.

Beyond this common purpose, each section provides a specific remedy. The first of these sections provides a remedy for judgment creditors who are out of the *possession* of property sold, and seeks actively to come into the possession thereof. To be entitled to their remedy, they must have judgments such as the statute indicates—not by confession. The latter section provides a remedy for the *purchaser* in *possession*. By doing what the creditor is required to do, the purchaser may resist the redemption by the creditor. Not like the creditor who is the actor, the purchaser is standing on the defensive. He must do nothing more than the statute requires him to do. He must credit a *subsisting judgment*. The statute requires that the judgment shall have no other quality. The statute is a remedial one, and should be liberally construed.

The rights claimed by the purchaser are, that although his judgment was obtained by the confession of the debtor with the disability imposed by section 2881, of not allowing such creditor to redeem, that this is the only disability imposed upon such creditors, and that he has all the rights as a purchaser under section 2882, of any other creditor. If the purpose of section 2882 was to prevent a sacrifice of property by providing for rival biddings between creditors, a creditor

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by the confession of the debtor has a claim as valid against the property of the debtor, as any other judgment creditor. He is entitled to have execution upon his judgment, and when it enters the hands of the sheriff, his lien upon the property is as valid as that of any other creditor, and if the purpose of this statute is, to bring the property of the debtor within the range of the subsisting claims against it, why should not the creditor, whose judgment is by the confession of the debtor, enter into the biddings as provided for in this section.

MANNING, J.—This was an action of unlawful detainer brought by appellant against Steele the defendant. The case arose under the sections of the Code authorizing judgment creditors to redeem within two years, lands of their debtors which have been sold under execution, or decrees in chancery, or powers of sale in mortgages. And the single question presented and argued here is this: When a judgment creditor who is entitled to redeem, in order to do so, tenders to the purchaser of his debtor's land which has been thus sold, all that the statute prescribes, and offers to credit the debtor upon a judgment against him, with ten *per cent.* or more of the price for which the land was sold,—has the purchaser to whom the tender and offer are made, the right to respond and retain the land, by himself crediting the same amount, upon a judgment he has against the debtor, if that judgment was obtained by the confession of the debtor, after the land was sold? In this instance, the judgment in favor of the purchaser was confessed after the sale, and one day before that on which appellant, the plaintiff below, obtained its judgment by due course of law; and the debtor, Steele, remained in possession of the premises as tenant of the purchasers.

Preceding sections having provided for the redemption by the debtor himself, upon terms prescribed therein, section 2881 (2513) of the Code of 1876 enacts that any "creditor of the debtor, who without fraud or collusion had obtained such judgment before the sale of the land, or within two years thereafter, *except by confession of the debtor*, may in like manner redeem the land from such purchaser or any one claiming under him by paying or tendering the amount bid for such land at the sale thereof, and ten *per centum* thereon together with all lawful charges,—and by further offering to credit the debtor *upon a subsisting judgment*, with a sum at least equal to ten per cent. of the amount originally bid for

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the land," &c. The next section (2882), provides: "But if the purchaser or person claiming under him, agrees to credit and actually does credit the debtor *upon a subsisting judgment*, with the sum offered to be credited by the creditor, he may retain the land, unless the creditor makes a further offer to credit the debtor *upon a subsisting judgment* with an additional sum," &c.

While judgment "by confession of the debtor" is spoken of but once in this law,—a crediting of the debtor "*upon a subsisting judgment*," is mentioned three times;—twice in reference to the judgment held by the redeeming creditor, and once in respect to a judgment upon which the purchaser may enter a credit to be set off against that of the creditor who proposes to redeem. And of neither of these judgments is it expressly said—that it must not, if obtained after the land was sold, be a judgment by confession. The letter of the law would, therefore, not be violated, if we should hold that a creditor desiring to redeem, who had a judgment upon verdict for a small sum, say less than ten per cent. of the price, paid for the land, and a judgment rendered upon confession after the sale, for a large amount, is entitled to credit the ten *per cent.* or more which he should bid, either at first or afterwards, upon the judgment by confession. Moreover, we should thereby give to the clause concerning judgments by confession, some effect. But certainly this would not be all the effect the law-makers intended it should have. We can not read the entire statute, without perceiving that at least in two of the places where the expression, "a subsisting judgment," is used, the legislature meant that it should not include judgments obtained by confession of the debtor. And considering the policy of the enactment, and the fact that in the third place where this expression is used—it is so closely connected, both in location, and meaning with the same expression where it occurs in the other places, we feel compelled to hold that it was used in all three instances in reference to judgments not obtained by confession.

The object of the law was to prevent the sacrifice of real estate at forced sales, by inducing purchasers to bid prices for it not greatly below its value. To this end, the debtor whose it was, or his judgment creditors—may redeem it within two years, on terms prescribed. According to the next section (2883) of the Code, if one creditor redeems and thus becomes the purchaser of the land, another is also authorized to redeem on like terms, from him. And it is to promote fairness among all the parties, in these contests or

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biddings for the property, so that they shall be conducted "without fraud or collusion," that there is a prohibition against the use therein of judgments obtained by confession of the debtor after the sale. These might be as dishonestly confessed, and as fraudulently and collusively employed by a friendly purchaser of the land, whether a creditor or not, as by a friendly creditor who proposes to redeem. Indeed, when a judgment creditor has done all that the law requires, to entitle him to acquire the land from the purchaser, and the latter, in order to retain it, offers to credit over and above the price at which he bought, a further sum upon a judgment against the debtor, such purchaser then becomes himself, in effect, a judgment creditor proposing to redeem of the opposing creditor, and so retain the land from him.

We therefore feel compelled to hold that the statute prohibits the use of a confessed judgment to a purchaser who is resisting a redemption of the property, as well as to a creditor who is seeking to redeem it.

The circuit judge erred in giving the instruction to the jury, that if they believed the evidence they must find a verdict in favor of defendant,—and in refusing to give the contrary instruction asked for plaintiff.

Judgment reversed and the cause remanded.

Milner & Co. v. Clarke.

Real action in nature of Ejectment.

1. *Tax sale; when void.*—Under the revenue law of 1868, the tax-collector had no authority to sell lands for non-payment of taxes, until after advertisement showing, among other things, the name of the owner when known, &c.; and where lands were given in for assessment and assessed against the true owner, an advertisement describing them as belonging to an entirely different person, confers no authority to sell, and the purchaser at such sale does not acquire title.

APPEAL from Montgomery Circuit Court.

Tried before Hon. JAMES Q. SMITH.

This was a statutory real action brought by the appellants, Milner & Co., against the appellee, H. W. Clarke, to recover a certain lot in the city of Montgomery.

The appellants deduced title by regular conveyances from Charles T. Pollard, whose title was not disputed, and the

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appellee defended on tax deeds to the premises made under sale for the taxes of 1870 and 1871. The lands in controversy were shown to be situated in beat four of Montgomery county. They were assessed in each year to W. J. Bean, but they were described in the assessment as being in beat five. The advertisement for the sale for the taxes of 1870, described them as being in beat five, but did not state to whom they were taxed. The advertisement of the sale for the taxes of 1871 omits to state in what beat they were situated, and states that they were assessed to B. B. Ragan. The defendant introduced deeds to lot made by the probate judge to him under the tax sales for each of these years.

The court charged the jury that if they believed the evidence they must find for the defendant. This charge was excepted to, and is now assigned as error.

H. A. HERBERT, and W. R. C. COCKE, for appellant.

DAVID CLOPTON, *contra*.

BRICKELL, C. J.—There are numerous errors assigned on the rulings of the Circuit Court in the admission of evidence against the objection of the appellants, we do not deem it of importance to consider. The real controversy is as to the validity of the sales of the premises in dispute, for the payment of taxes, under which the appellee deduces title. If these sales are invalid, it can not be denied that the appellants have the legal title to the premises, and were entitled to recover. The validity of the sales have been controverted on several grounds, to one of which we confine our attention. The assessment and the sales were made under the revenue law of 1868, and that law must determine their validity. The premises were assessed for the taxes of 1870, and 1871, to W. J. Bean, the beneficial owner, having in them a perfect equity, and who was in possession by his tenants. The sixty-third section of the revenue law of 1868, required the tax-collector to give notice of the sale of lands for non-payment of taxes, by advertisement in the official journal of the county, and by posting notice on the door of the court-house, and required that "such advertisement shall state the time and place of sale, and contain a description of the several parcels of real property to be sold, as the same are recorded on the tax list, the amount of taxes for each year, and the names of owners when known, or person, if any, to whom taxed." The premises were situate in beat or election pre-

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inct number four of Montgomery county, but were described in the assessment as situate in beat number five. The advertisement of the sale for the taxes for 1870, described them as situate in beat number five, and omitted to state to whom they were taxed. The advertisement of the sale for the taxes for 1871, omitted to state the beat or election precinct in which they were situate, and stated that they were assessed to *B. B. Ragan*.

Sales of real estate for the payment of taxes are made in the execution of powers conferred by statute, under proceedings which are in a great measure *ex parte*, of which the persons to be affected by them, have by law only constructive notice. To render them valid, divesting the owner of his estate, there must be a rigid adherence to the directions and forms of the statute, especially when these are intended for the protection and benefit of the owner.—*Lyon v. Hunt*, 11 Ala. 295; *Scales v. Alvis*, 12 Ala. 617; *Parker v. Burgen*, 20 Ala. 251; *Elliott v. Eddins*, 24 Ala. 508. The statute required that real property should be assessed to the owner when known, and one of the objects of the requisition that the advertisement of sale should state his name, or the name of the person to whom it was taxed, was to afford them notice of the sale, and the opportunity of curing their delinquency by a payment of the taxes before the sale was made. Whatever may have been the object, it was a direction to the tax-collector he was bound to observe, and failing to observe it, he was without authority to sell the premises. *Washington v. Pratt*, 8 Wheaton, 81; *Shimmin v. Inman*, 26 Maine, 228; *Sargent v. Bean*, 7 Gray, 125; Cooley on Taxation, 336; Blackwell on Tax Titles, 235. This objection to the validity of the sale could not prevail if section eighty-seven of the revenue law of 1868, could be sustained, but that section so far as it could exert any influence on this question has been several times declared unconstitutional.

The charge of the Circuit Court was erroneous, and its judgment is reversed and the cause remanded.

STONE, J., not sitting.

[Hamill v. Gibson.]

Hamill v. Gibson.

Contest of Election of County Solicitor.

1. *Submission for decision in vacation; construed.*—A bill of exceptions was reserved to the ruling of the probate judge on a contest of the election for county solicitor, and an appeal taken from this judgment to the Circuit Court, where the cause was submitted, by consent, to the circuit judge for decision in vacation, with the stipulation that the decision, "*be made in eight weeks and entered up as of the present term.*"—*held:* The terms of the submission were satisfied, if the judge reduced his decision and judgment to writing, within the prescribed period, so that it could be entered of record at a future day; and the judgment was valid, though not filed with the clerk and entered of record until the succeeding term, and after the expiration of the judge's official term.

. APPEAL from Blount Circuit Court.

Tried before SAMUEL F. RICE, Esq., an attorney of the court.

Hamill contested the election of Gibson to the office of county solicitor before the probate judge, and appealed from an adverse judgment to the Circuit Court. In that court the cause was submitted for decision to the presiding judge, (Hon. W. J. Haralson) "on the record and such brief as may be submitted. Decision to be made in vacation in eight weeks, and entered up as of the present term of this court." This agreement was made September 12th, 1874. Judge Haralson, in the following month, reduced his judgment to writing, together with an opinion, but neither was filed until March, 1875. Hamill moved to vacate and set aside this judgment on the ground that it was not rendered within eight weeks after the submission. His motion was overruled and he excepted. This ruling is now assigned as error.

HAMILL & DICKINSON, for appellant.—The decision was to be made in eight weeks and entered up, *in vacation*, as of September term, 1874. The written opinion and judgment rendered by Judge Haralson was filed in the clerk's office, *without any date*, on March first, 1875, the first day of *spring term*, 1875.

Judge Haralson's term of office expired in November, 1874, and Judge Wyeth succeeded him. Could any act or declaration of his, made after his term of office expired, give force or effect to the judgment of the Circuit Court in the

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judgment in this cause? When his term expired, the cause was undecided, so far as the parties knew, or the records of the court disclosed, and it so remained until the next term of the court, when Judge Haralson, then a mere private individual, filed the paper purporting to be a final judgment therein, and without any date whatever.

A. M. GIBSON, *contra*.

BRICKELL, C. J.—The cause was by consent of parties submitted to the judge of the Circuit Court for decision in vacation with no other stipulation, than that the “decision be made in eight weeks, and entered up as of the present term of this court.” The cause was on appeal from the judgment of the judge of probate rendered on a contest of the election of county solicitor, and all questions for decision arose on a bill of exceptions reserved to his rulings, and were of course triable by the court without the intervention of a jury. The judge of the Circuit Court within eight weeks from the submission, reduced his judgment to writing, but it was not filed until the succeeding term of the court, and after the expiration of his official term. The appellant objected to the entry of it on the records, insisting that as it was not filed within eight weeks after the submission, it was not within its terms. The limitation of time within which the decision was to be made, was doubtless introduced for the purpose of obtaining a judgment at as early a period as was supposed practicable, and quieting the litigation. But it extends only to the time within which judicial power could be exercised; and does not impose as a condition to the validity of its exercise, that the judgment should be filed with the clerk of the court to be entered of record within the time mentioned. The terms of the submission were satisfied, when the judge within eight weeks, reduced his decision and judgment to writing, so that it could at a future day be entered of record. It may be that until the expiration of the last day, he had not finally determined the cause. The opinion accompanying the judgment bears evidence that he carefully considered, and passed upon each of the several questions arising on the record, and whatever of delay there was in filing his judgment with the clerk of the court, may have been, and it is fair to presume, was unavoidable. The objection of the appellant to the entry of the judgment in conformity to the submission was properly overruled.

We pass the remaining assignments of error, as they have

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not been insisted upon in the argument of counsel, and we are not inclined to the opinion there is any merit in them. A decision of them now, would be of little, if any practical importance, as the statutes under which they arise, have long since been superseded by later legislation.

The judgment is affirmed.

Sharpe v. Orme.

Real Action in nature of Ejectment.

1. *Deed; when not self proving.*—Unless a deed is properly recorded within twelve months from its date, it is not self proving under section 2154 of the Code.

2. *Acknowledgment of deed; what sufficient.*—A literal compliance with the forms prescribed by the statute, for the acknowledgment and probate of deeds, will not be exacted; it is sufficient if it fairly appears that the statute has been substantially complied with; and in determining this, the certificate or acknowledgment may be read in connection with the deed.

3. *Same; how may be proved.*—Where a grantor wrote his name to a conveyance, which was not attested, but acknowledged before a justice of the peace, the certificate of acknowledgment operates as a substitute for the attestation of a witness; and where the deed was not recorded within twelve months, the party wishing to introduce it, may, upon showing that the officer is without the jurisdiction of the court, prove his handwriting, and thereby render the deed admissible.

4. *Deed, alterations in; presumptions as to.*—Material alterations of a deed after its delivery, can be made operative only by a new attestation or acknowledgment. Where interlineations appear in the handwriting of the grantor, merely curing an imperfect description of the lands, and according with all the purposes and objects of the deed, the fair presumption is, that the interlineations were made before the acknowledgment of execution; and the burden of repelling the presumption, rests on the party asserting the contrary.

5. *Same; what alteration not sufficient to avoid.*—An innocent alteration made by the grantor, after the delivery of the deed, to cure his own inadvertence and make the instrument accord with its purposes and objects, will not divest the title which has vested by the deed.

APPEAL from Montgomery Circuit Court.

Tried before Hon. JAMES Q. SMITH.

Appellants, the heirs-at-law of Josephus Sharpe, brought their statutory real action against the appellee, Jane C. Orme, to recover certain lands. Appellants claimed title by a deed from the appellee and her husband, Thomas J. Orme, who has since died, leaving her in possession.

This deed was regular in form, and was acknowledged before a justice of the peace, whose certificate is as follows:

“State of Alabama, Montgomery County. I, G. H. Coch-

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ran, a justice of the peace for the county aforesaid, do hereby certify that T. J. Orme and J. C. Orme, who is known to me, acknowledged before me, that being acquainted with the foregoing conveyance they did the same voluntarily, on the day the same bears date.

"Given under my hand this, the 7th day of May, 1867.

"G. H. COCHRAN, J. P."

Said deed was executed on the 7th day of May, 1867, and recorded on the 31st day of May, 1869.

On the trial, plaintiffs offered the deed in evidence, and "proved" that said deed and the signature thereto, purporting to be that of Thomas J. Orme, and the cancellation of the stamps and the acknowledgments, except the words, "given under my hand this, the 7th day of May, 1867. G. H. Cochran, J. P.," were all in the handwriting of Thomas J. Orme, one of the grantors.

Certain interlineations and alterations appeared on the face of said deed, which, witnesses examined as experts, testified were in different ink from the body of the deed and the acknowledgment, but in the same ink as the cancellation of the stamps, and that they were in the same handwriting as the body of the instrument, the cancellation of the stamps and the signature purporting to be that of Thomas J. Orme, one of the grantors. Said witnesses could not state as to the time when the interlineations and alterations were made, whether before or after the execution of the deed; but expressed the opinion that they were made after the body of the instrument and signatures and acknowledgment were written, because "in different ink from them, and because the alterations were written on and over the words originally written in the body of said deed."

In the deed, the lands are described as portions of section thirteen, range nineteen, and the interlineations consist of the words "six township" inserted between the words "section" and "thirteen," and the alterations changing the number of acres from "760 more or less" to "840 more or less." It was "proved" that said Thomas J. Orme had been in possession of the lands described in the complaint, for about twenty years before his death, which occurred in 1872, building houses thereon and cultivating the same; and that after the execution of said instrument, he continued to reside on said lands, cultivating and managing the same, till his death; but that he declared he was doing so as the agent of Josephus P. Sharpe, and that said Sharpe furnished some corn and other provisions to cultivate the place.

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There was evidence tending to show that the words "Given under my hand this, the 7th day of May, 1867. G. H. Cochaan, J. P.," were in the handwriting of said Cochran, and that he had removed to the State of Texas.

The court, at the request of the defendant, in writing, charged the jury, if they believed the evidence, they must find for the defendant. To this charge plaintiffs excepted, and it is now assigned as error.

T. M. ARRINGTON, for appellants.—The interlineations in the deed, of the words "six township," and at the end of a particular description of the land, and the alterations changing the number of acres from "760 more or less" to "840 more or less," are of no possible consequence, intended only to supply a defective description of a small portion of the land, showing only what section and township were meant, and not attempting to convey other lands than those already described in the deed; and *all being in the handwriting of the grantor, no question of fraud can arise.*

It is settled law that the alteration of a deed by the grantor, or with his consent, does not avoid it.—*Shepard's Touch.* 68; *Speake v. United States*, 9 Cranch, 28.

At most, the interlineations could only vitiate the deed to the extent of the land which had been misdescribed, and where a deed had been delivered and title vested in the grantee, an alteration does not undo what has been done. Even where the alteration is fraudulently intended, it is fatal to the instrument only as to the covenants or undertakings contained in it—that is to say, such parts of it as are executory.—*Kendall v. Kendall*, 12 Allen, 92; *Cheepman v. Whittemore*, 23 Pick. 231; *Lewis v. Payne*, 8 Cowen, 71.

The acknowledgment, though not in the precise language of the form set out in the Code, is in substantial compliance therewith, and that is all the law requires.—*Kelly v. Calhoun*, 5 Otto, 713.

Section 2154 of the Code provides that conveyances acknowledged, or proven according to law and recorded within twelve months from date, may be received in evidence without further proof. More than twelve months had elapsed before the recording of the deed, but it falls within the operation of the act of March 20th, 1875, p. 180, which permitted conveyances not then recorded, to be recorded within twelve months. This deed was already recorded at the time of the passage of the act, and to re-record it would have been a vain thing—only leading to complication.

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CLOPTON, HERBERT & CHAMBERS, *contra*.

BRICKELL, C. J.—1. The statutes require that conveyances for the alienation of lands must be written or printed on parchment or paper, and must be signed at their foot by the contracting party, or his agent having a written authority; or if he is not able to sign his name, then his name must be written for him, with the words “his mark” written against the same or over it; the execution of such conveyance must be attested by one, or where the party can not write, by two witnesses who are able to write, and who must write their names as witnesses. Code of 1876, § 2145. The acknowledgment of execution, which is authorized by subsequent sections of the Code, operates as a compliance with the requisition of attesting witnesses.—*Ib.* § 2144. The form of acknowledgment is prescribed, but if the form is not substantially complied with, the result as declared is, that the conveyance loses the privileges conferred by section 2154 of the Code.—*Ib.* §§ 2158–61. That section is in these words: “Conveyances of property, whether absolute or on condition, which are acknowledged or proven according to law, and recorded within twelve months from their date, may be received in evidence in any court without further proof, and if it appears to the court that the original conveyance has been lost or destroyed, or that the party offering the transcript has not the custody or control thereof, the court must receive a transcript duly certified, in the place of such original.”

These enactments have placed the law in reference to the execution and proof of conveyances upon an entirely new footing in several important particulars. First, is the necessity of attesting witnesses, or an acknowledgment of execution by the grantor, taken and certified by a proper officer. Second, the proof of the instrument by the certificate of probate or acknowledgment. Third, proof of its contents and existence by a transcript from the record, when the original has been lost or destroyed. Or if the proof is to be made by one to whom the custody of the original is not imputable, then the introduction of such transcript, without accounting for the absence of the original, and without an effort to produce it. In each case, authorizing the use of a copy of a copy in derogation of the common law.

The deed is not attested by a witness, and the point of contention is, whether the certificate of acknowledgment satisfies the statutory requisition, or if it is defective, can parol evidence supply the deficiencies. The certificate is very

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informal, and substitutes some words for those employed in the form prescribed by the statute, and omits others. Yet, when the deed is examined in connection with the certificate, by fair legal intendment, it appears that the grantors on the day of the date of the deed, acknowledged that with knowledge of its contents, they executed it voluntarily. While courts are constrained to disapprove departures from the simple forms prescribed by the statutes—and though such departures render titles insecure and invite litigation, liberality, not strictness of construction, is the rule which has been observed. The want of substance can not be disregarded, opening a door for fraud and forgery, and by judicial legislation nullifying the statute—words can not be added to, or the equivalent of material words found in the statutory forms, dispensed with. Yet when it fairly appears that the statute has been substantially complied with, a literal compliance with the statutory form is not enacted.—4 Phil. Ev. (C. & H. notes), 462.

In *Bradford v. Dawson*, 2 Ala. 203, under a statute which required that the grantor should acknowledge, *that he signed, sealed and delivered the deed on the day and year therein mentioned to the grantee*, a certificate not stating that the grantor acknowledged that he executed the deed on the day of its date to the grantees, was deemed a substantial compliance with the statute. The court say: "The supposed defects in the certificate vanish the instant the body of the deed is examined; for, we then ascertain that the day of the date, is the same day when the acknowledgment was made. We likewise perceive, that the deed was executed by the trustees as well as the grantor. It was not necessary that the former should have signed, or otherwise executed the deed, and certainly a defective acknowledgment by them can not prejudice the deed, when no action whatever is required on their part. It is said, however, that the body of the deed ought not to be looked at to support the probate. It seems to us, that every probate must, of necessity, be compared with the deed; to illustrate our opinion, let the probate be supposed as precisely formal in terms, yet, if the acknowledgment was not made by the person named as the grantor, it would be clearly void. It is obvious, that the difference in the names would appear only by an inspection of the body of the deed and by comparison with the probate." The court further say: "The only general rule with respect to the construction of these certificates, when the object is to support the registration, is, that when the statute has been substantially com-

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plied with, the rights of the parties shall not depend on strict criticism, but that any portion of the deed may be examined to give effect and meaning to a certificate which is apparently defective."

The acknowledgment and certificate in this case, is merely a substitute for an attestation by a witness, the parties to the deed, being able to write and having signed it. If it had been attested, no more than the signature of the witness would have been necessary—no affirmation by him of his knowledge of the parties, or of their identity or of their acknowledgment that with knowledge of its contents they voluntarily executed it, could be required. It can not be a proper construction of the statute, which would vitiate the instrument as a conveyance of the legal estate, *as between the parties*, because the officer before whom its execution was acknowledged, from ignorance or carelessness, imperfectly certifies the facts. The certificate is his act, and he, not the parties, speaks by it. The material fact is, that the grantors acknowledged the execution of the conveyance voluntarily, with knowledge of its contents, and whenever this can be fairly and reasonably spelled out from the certificate, the requisitions of the statute are satisfied. When this certificate is read in connection with the deed, the fact appears with certainty. The only doubt about it which can be generated, is by referring to the statutory form, and observing how far the certificate departs from its letter. Literal compliance with the form is not essential.

The deed not having been recorded within twelve months from its date, the certificate was not evidence of its execution. The privilege of proof of execution by the certificate is by the statute confined to deeds which are recorded within twelve months after their date. When the subscribing or attesting witness to a written instrument, is not within the jurisdiction of the court—when his residence is in a foreign country, or in another State, the instrument may be read in evidence, upon proof of his handwriting. The certificate of acknowledgment, operating as a substitute for the attestation of a witness, when it is shown that it is legally impossible for the party proposing to introduce the conveyance in evidence, to produce the officer making it, by reason of his residence without the jurisdiction of the court, may be proved by evidence of his handwriting, and when the evidence is given, the conveyance may be read. The admissibility of parol evidence, to supply defects in the certificate of acknowledgment, when the purpose is simply to satisfy the statutory

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requisition *as to the execution of the instrument*, and not to impart to it the force and operation of a conveyance recorded, it is not necessary to consider, in the view we take of the certificate.

2. The interlineations apparent on the face of the deed, are not of themselves of a character to excite suspicion. They are mere completions of imperfect descriptions of parcels of the lands, and of the aggregate number of acres the deed importing a sale by description, or metes and bounds, and not by the quantity. All unfavorable presumptions against the grantee are removed by the fact, that these interlineations are in the handwriting of the grantor, Thomas J. Orme, in whom the legal estate in the lands resided. If it had been shown they were made after the delivery of the deed, the conclusion would be, that they were made by consent, and the validity of the deed would be unaffected by them, if it were not that an attestation by witnesses, or an acknowledgment of execution before a proper officer, is essential to the valid execution of a conveyance passing the legal estate in lands. Material alterations of the deed after its delivery, can be made operative only by a new attestation or acknowledgment. The point of time to which the inquiry as to the making of these interlineations should be confined, is the acknowledgment of the execution. If they were made before, or concurrently with such acknowledgment, they are parts of the deed, and as operative, as if they had been incorporated in the body of the deed in its original writing. If made subsequently, though by the grantor, with the consent of the grantee, the legal estate in the lands, the description of which they perfect, would not pass by them, without a new acknowledgment, or an attestation of the fact by a witness in the mode prescribed by the statute. These interlineations merely curing an imperfect description of the particular parcels of the lands, accord with all the purposes and objects of the conveyance, and it is but a fair presumption, their omission in the original writing of the deed was merely inadvertent. The inadvertence was corrected, so soon as it was discovered, it is also fair to presume. The legal presumption under the circumstances, is, that they were made before the acknowledgment of execution, and the burden of repelling the presumption rested on the party asserting the contrary.—3 Wash. Real Prop. 221; 1 Whar. Ev. § 629; 1 Green. Ev. § 564. The time of making the interlineations, when any evidence repelling, or tending to repel the legal presumption is given, is a question of fact the jury must determine.

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Though these interlineations were made subsequent to the acknowledgment of the deed, they would affect its validity, only so far as it purports to pass the title to the particular parcels of lands, the description of which is perfected by them. A fraudulent alteration of a deed by the grantee does not divest the title which has vested in him.—It may preclude him from enforcing covenants of warranty found in the deed, but his estate in the lands, so far as it is vested, remains. The principle is thus stated in 1 Green. Ev. § 568: “But here also a further distinction is to be observed between deeds of conveyance and covenants; and also between covenants or agreements executed, and those which are still executory. For if the grantee of land alter or destroy his title-deed, yet his title to the land is not gone.” In the note of Hare & Wallace, to *Master v. Miller*, 1 Smith, L. C. 1280, the principle is stated in the words which follow, and numerous authorities are cited in support of it: “The instrument as far as the spoliator is concerned, is from that time destroyed and extinguished; its past operation is not contractd; executed contracts evinced by it, are not rescinded; estates and titles vested by transmutation of possession, whether by common law or the statute of uses, are not divested.” A fraudulent spoliation not operating a divestiture of title, it would be singular if an innocent interlineation, the act of the grantor, intended to cure his own inadvertence, and make the instrument accord with its purposes and objects, should have a larger operation.

There is no view of the case, in which the charge given can be sustained. Let the judgment be reversed, and the cause remanded.

Harrell *et al.* v. Mitchell.

Bill in Equity to set aside Fraudulent Conveyance.

1. *Reexamination of witness; when not allowed.*—The reexamination of a witness after hearing and final decree, for the purpose of altering or correcting his testimony, as to a matter discussed in court and judicially weighed, opens a wide door for fraud and perjury, and ought not to be tolerated.

2. *Fraudulent conveyance; what admissible to show.*—Where the grantor's creditors assail his conveyance for fraud, the fact that at the time of the sale suits were pending against him, or that he apprehended suits, and other evidence of his general pecuniary condition, is admissible.

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3. *Same; indicia of fraud, burden of proof.*—Where a *bona fide* creditor shows *indicia* or badges of fraud, the burden rests on the grantee to repel the presumptions they generate; if his ability to pay is questioned, he must show the source or means by which he obtained the money, and that there was a real adequate consideration, actually paid; and whatever there may be, not in the ordinary or usual course of such transaction, should be fully explained.

4. *Same.*—The fact that the son, shortly after receiving a conveyance of lands from an insolvent father, conveys parts of them to each of the other children, without any valuable consideration shown therefor, casts suspicion on the transaction, which can be removed only by clear and convincing evidence of fairness, good faith, and an actual consideration, really paid.

5. *Conveyance; what evidence justifies decree annulling for fraud.*—The relationship of father and son between grantor and grantee; the grantor's known insolvency and apprehension of threatened suits; the failure of the grantee to show with particularity when, where, or how he obtained the means to pay the consideration; the fact that shortly after the conveyance the grantee, without any valuable consideration shown, conveyed parts of the land to each of the other children; the failure to show what disposition the grantor made of the large consideration mentioned in the deed,—justify the court in holding the conveyance fraudulent as to existing creditors.

6. *Decree of sale; what erroneous.*—Where, before bill filed, a fraudulent grantee conveyed parts of the lands to others, and put them in possession, and these persons, though named, are not made parties, nor description given of the portions of land sold to them,—a decree under which such parts of the lands could be subjected, is erroneous, and will be here corrected.

APPEAL from the Chancery Court of Dallas.

Heard before Hon. CHARLES TURNER.

The original bill in this cause was filed by the appellee, John P. Mitchell, against the appellants, Gabriel H. Harrell, Whitmell F. Harrell, and W. H. Harrell, and sought to condemn certain lands, then in the possession of W. H. Harrell, to the payment of a note made by the said Whitmell F. and Gabriel H. Harrell, to one Mitchell, the testator of appellee, which note then belonged to appellee.

The bill alleged that a judgment at law had been rendered in appellee's favor on the note, on January 10th, 1872, and that execution thereon had been returned "no property." It is alleged, that at the time said debt was contracted, and for many years afterwards, Whitmell F. owned a valuable plantation of 240 acres, which he and his wife, by voluntary conveyance, executed on the 19th day of October, 1865, had conveyed to their son W. H. Harrell; that at the time the deed was executed, Whitmell F. was insolvent, and that the conveyance was made with the intent to hinder, delay and defraud complainant.

The bill further charged, that when said deed of the 19th of October, 1865, was made, said Whitmell F. was a surety on the bond of one Thomas Walker, as administrator of Joseph Walker, and that said deed was made for the purpose of avoiding the payment of any liability that might be fixed

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on Whitmell F. as surety, as well as to escape the payment of complainant's demand on said note.

Whitmell F. and W. H. Harrell answered, denying that Whitmell F. was insolvent at the date of the execution of the deed to W. H. Harrell, and averring that the deed was made in pursuance of a parol gift of the lands to W. H. Harrell in 1860.

The answers also alleged that Whitmell F., at the time he executed the deed of 1865, owned other real estate; that afterwards, on June 8th, 1868, said Whitmell F. conveyed these lands, and also the lands conveyed by deed of 1865, to his son W. H. Harrell, for the sum of \$14,800, which was its fair value.

The complainant then filed an amended bill, alleging that the sale to W. H. Harrell, set up in the answer, was a simulated one, and that no consideration was paid for said land; that the conveyance was made to hinder, delay and defraud the creditors of Whitmell F.; that W. H. Harrell, at the time he purchased said lands, in June, 1868, was a man of but "small means, and not able to pay the large sum which purported to form the consideration of the deed." The amended bill averred that W. H. Harrell had, subsequently to the execution of said deed of June, 1868, conveyed certain portions of the lands embraced in it, by voluntary deeds to his wife and two of his children, and makes them parties defendant, praying that these deeds be declared fraudulent.

Whitmell F., W. H. Harrell, and his wife and children, answered the amended bill denying emphatically any fraudulent intent in the making of any of the deeds. The answer of W. H. Harrell sets up the conveyance made to him by his father, Whitmell F., in June, 1868, was made for the *bona fide* consideration expressed, and that he had actually paid the consideration named. It admits the execution of the deeds to the wife and children, and avers that he had also sold portions of said land to his brother Finis E. Harrell, to Alexander H. Averytt, his brother-in-law, and to his sister Mrs. Forss, and to James Brantley, and had put them in possession of the portions conveyed to them. He averred that the deeds to all the persons named, except his wife and children, were made on valuable consideration. None of these persons, except Harrell's wife and children, were made defendants.

W. H. Harrell testified that in June, 1868, he purchased of his father the lands mentioned in the bill, for the sum of \$14,800, and paid him that amount in cash, in the office of

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Pettus, Dawson & Tillman, in the presence of Dr. A. G. Mabry and John W. Roberts; that he handed the money to Roberts to count, who, after counting it, handed it over to Whitmell F.; that the terms of sale had been agreed upon before the payment was made, and the deed had been prepared and sent to Blount county where his father then resided; that he met his father by appointment, paid the money as above stated, and received the deed. He denies that he knew of the existence of complainant's debt at the time he made such purchase. In reply to a question as to where he obtained the money to make the payments, the witness stated, "I paid for said land with money which I received from the sale of cotton and corn and meat and cows, and received for debts due to me. I can not say how much of said money I received from each of these sources, but most of it was for cotton sold by me. It is not possible for me to state, when, where and from whom I got each portion of the money." Roberts, a witness for defendants, stated that he was present in the office of Pettus, Dawson & Tillman, and saw W. H. Harrell pay his father a large sum of money; that he was not positive as to the amount, but "thought it was eight or ten thousand dollars; that he had an indistinct recollection of a deed being passed between them."

The complainants introduced in evidence certified transcripts from the Circuit Court of Dallas, showing that judgments had been recovered against Walker, (upon whose bond as administrator of the estate of Josephus Walker, deceased, said Whitmell F. was surety,) in the years 1867 and 1868, in favor of various persons, for over twenty thousand dollars. The return of execution on these judgments showed that they had been levied on certain lands and personalty of said Walker, which were sold by the sheriff in 1869. After paying the executions and costs, &c., and setting apart the exemptions to the widow of Walker, there remained a balance of over a thousand dollars, which was claimed by said Thomas Walker's administrators. The transcript of the records from the Probate Court of Dallas showed that before Walker's death, and in June, 1868, proceedings were pending to compel him to settle his administration of the estate of Josephus Walker; and that he was then largely indebted on account of the administration. Shortly after Thomas Walker's death, his estate was declared insolvent. The defendants objected to the foregoing evidence, on the ground of irrelevancy, but their objection was overruled.

It appears from the evidence that the land conveyed to

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W. H. Harrell in 1868, constituted the bulk, if not the whole of the property then owned by Whitmell F. who had been rendered insolvent by the result of the war. It was also shown that Whitmell F. was at the date of the deed in feeble health, and that W. H. Harrell had been for a considerable period of time his general agent in the transaction of business.

No evidence showing what had become of the money paid by W. H. to Whitmell F. Harrell was introduced by either of them; and it is not shown that the persons to whom Harrell conveyed, on an alleged valuable consideration, had paid him anything.

J. J. Moore, a witness for complainant, testified as to the pecuniary condition of W. H. Harrell at the time of the alleged purchase, stating that from his knowledge of the farming operations carried on by him, and which was his only source of income, so far as he knew, he could not have made the sum expressed as the consideration of the deed; but stated that he might have had other employment, of which he did not know. He further stated that his credit was good. This witness further testified, that while he was at Blount Springs in 1868, "W. H. Harrell was negotiating for the purchase of a tract of land in Blount county, and the said W. H. Harrell told me that he was trying to buy it for his father, who was to take it in part payment of the plantation in Dallas, which he, W. H. Harrell, had got from his father."

Two other witnesses were examined who stated that said Harrell had ability to pay the purchase-money, but their statement as to this was based on the fact that said Harrell had been his father's overseer for several years, and he owed him therefor; that his services as overseer were worth \$1,000 per annum.

The chancellor rendered a decree granting the relief prayed, and accompanied it by a written opinion, in which he examined the evidence, and laid considerable stress on the testimony of Moore.

After this final decree had been rendered, defendant applied for a rehearing on the ground of newly discovered evidence, and because the witness Moore was mistaken as to material statements made by him. An affidavit of Moore was filed in support of this application, in which he testified that he was mistaken as to the date of the conversation mentioned in his original deposition, and that it took place in 1869 instead of 1868, as stated in his testimony; he fur-

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ther testified that he was mistaken in stating that W. H. Harrell had told him that he was negotiating for the purchase of the lands for his father. The court granted the rehearing and made an order granting the defendant leave to reexamine the witness. By the testimony of this witness, on his second examination, it appeared that W. H. Harrell had conversed with him since, and by calling his attention to the surrounding circumstances, and arguing with him, had convinced him he was mistaken as to these matters.

Complainant moved, on this ground, to suppress the deposition of Moore taken on his second examination. The chancellor suppressed the deposition and rendered a decree declaring the deed of Whitmell F. to W. H. Harrell, dated on the 19th October, 1865, the deed between the same parties of June 8th, 1868, and the deed of W. H. Harrell to his wife and children, to be each void as to complainant, and ordering a sale, for the purpose of paying the debt due complainant, of the lands embraced in each of these deeds including also the parts which W. H. Harrell had sold to persons who were not made parties.

The decree, and the overruling of objections to the record evidence, are now assigned as error.

PETTUS, DAWSON & TILLMAN, and SATTERFIELD & YOUNG, for appellant.—The court will always permit the reexamination of a witness, after publication of the testimony, in cases where it appears by his affidavit that the witness has made a mistake in his prior deposition.—Dan. Ch. Pr. vol. 2, pp. 1150, 1156; *Kirk v. Kirk*, 13 Vesey, 286; *Denton v. Jackson*, 2 John. Ch. 526.

2. The transcripts from the Circuit Court were inadmissible. The defendant, W. H. Harrell, was neither party nor privy to the proceedings evidenced by said transcript. The transaction which led to the execution of the deed of June 8th, 1868, were consistent with honesty and a *bona fide* purchase by the son. The evidence clearly shows that the recited consideration was actually paid in cash, to the grantor, at the time the deed was delivered. There is no dispute that the price paid was not a fair and full one, and the only proof which tends to cast distrust on it, is the fact that the grantor was the insolvent father of the grantee. The evidence fails to show that the grantee even knew of the existence of the debt to appellee. The mere fact of their relationship is not enough to show *mala fides*. Even if Whitmell F. intended to place his property beyond the

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reach of his creditors, there is no evidence that W. H. Harrell either knew of or participated in the intention. He was a *bona fide* purchaser for value.—See *Tompkins v. Nichols*, 53 Ala. 197. It is a rule in courts of law, as well as courts of equity, that fraud is not to be presumed, but it must be established. Circumstances of mere suspicion, leading to no certain results, will not be deemed a sufficient ground to establish fraud.—1 Sto. Eq. Jur. § 190; *Stiles & Co. v. Lightfoot*, 26 Ala. 445; *Smith v. Branch Bank*, 21 Ala. 125; *Henderson v. Mabry*, 13 Ala. 713; *Ravisies v. Alston*, 5 Ala. 292.

W. M. BROOKS, and FELLOWS & JOHNS, *contra*.—The evidence clearly established the insolvency of the grantor at the date of the deed. The grantee was his son; had been and was his general agent, and it is fair to suppose knew his condition. The conveyance stripped the grantor of all his visible property. The consideration is a large sum, the money is paid with parade in the presence of witnesses. The son fails to show how he obtained the money, to make such a purchase. The grantor fails to show what has become of the large sum he is said to have received. The land is soon after deeded to various sisters and brothers of the grantee. The evidence shows that the son could not have had the large sum he paid. The whole surroundings stamp the transaction as a fraud.—See 3 Stew. 243; *Moore & Pain v. Tarlton & Paine*, 3 Ala. 444; *Beall v. Williamson*, 14 Ala. 62; *Pulliam & Co. v. Newberry*, 41 Ala. 168. The opinion of the chancellor on the facts should not be disturbed, unless there is a clear, decided preponderance of the evidence against his conclusion.—39 Ala. 63; 42 Ala. 147; 46 Ala. 161. The second deposition of Moore should have been suppressed. The witness was conscious of no mistake, until his attention had been called to the circumstances, and to use his language he had been argued into it by the defendant. It is perfectly natural that when the defendant saw the effect of the evidence he should endeavor to argue the witness into the belief that he had made a mistake; but such testimony should never be received. A defendant should never be allowed to thus manufacture testimony for himself. Such evidence would tend to defeat justice, and opens a wide door to fraud and perjury.

BRICKELL, C. J.—A reexamination of a witness, after the evidence has been published, a hearing had, and final

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decree rendered, it is said by Chancellor KENT, was never permitted, "merely to alter or correct testimony, after the cause has been heard and discussed, and decided upon the very matters of fact to which that testimony referred. It would be setting a most alarming precedent, and would shake the fundamental principles of evidence in this court."—*Gray v. Murray*, 4 John. Ch. 415. In *Johnston v. Glascock*, 2 Ala. 249, an application was made to this court to modify a decree of reversal, so that new evidence could be taken in the court of chancery, to explain and correct discrepancies in the evidence, these discrepancies having controlled largely the determination of questions of fact involved; the application was refused, the court remarking: "It is sufficient to determine us to refuse this petition that if the motion had been addressed to the chancellor, after the decree it should not have been allowed."

The rule in courts of equity, disallowing except under very special circumstances, the examination of witnesses after the publication of the evidence, even before hearing and decree, is founded on the soundest policy and highest wisdom, and it is feared that it is not enforced as rigorously as the ends of truth and justice require. It is not only a safeguard against fabricated evidence, but it quickens and keeps alive the diligence of suitors. "It is of great importance in the administration of justice, and ought to be constantly inculcated upon suitors, that they must bestow *diligence* in the prosecution and defense of their suits, and that every step in the progress of the cause, is to be taken *orderly* and in *due season*, and that though the courts are indulgent to mistakes and unavoidable accidents, yet they can not be so to the mere negligence or wilful defaults of parties, which only tend to hinder, fatigue and oppress each other."—*Hamersly v. Lambert*, 2 Johns. Ch. 432.

The chancellor could properly and ought to have refused the rehearing, and the order for the reexamination of Moore. The alteration and correction of his testimony on a point which had been "critically discussed in court, and the bearing and effect of every part of it understood and judicially settled," was unauthorized according to the authorities to which we have referred. It opened "a door to fraud and perjury, by holding out or encouraging inducements to supply insufficient evidence, or to withdraw or explain away that which has been oppressive." In this instance it may be there was not, and we would not be understood as intimating there has been, either fraud by the party reexamining,

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or perjury by the witness; but if the practice pursued were tolerated, an unscrupulous suitor and witness, would find the temptation and the opportunity.

The order having been made and the reexamination had, it is not matter of surprise, that the party obtaining the order, should have endeavored to convince the witness of his error, and to obtain from him testimony, which if it did not contradict, would neutralize or weaken the force of that he had already given, the bearing and effect of which the court had declared. That witnesses may be saved from such influences, is one of the reasons on which the rules disallowing a reexamination is founded. We are satisfied the second deposition of Moore was properly suppressed; and the chancellor could have gone further and rescinded the order for his examination.

Where creditors of a vendor, or of a grantor, assail a sale or conveyance he has made, as intended to hinder, delay and defraud them, the fact that at the time of sale, suits were pending against him, or that he was apprehensive suits would be commenced, and his general pecuniary condition, are facts of importance, they are permitted to prove. The value of the evidence depends upon its connection with other facts, and of the evidence of good faith, and fairness in the transaction, which may be given in support of it. The certified record from the court of probate, showing the liability of the grantor, as the surety of Walker, and the proceedings for the settlement of Walker's administration, pending when the conveyance was made, was admissible evidence. If these proceedings ripened into decrees against Walker, such decrees were causes of action against the grantor, on which suits at law could have been immediately commenced. Or on a return of execution against Walker, *no property found* in whole or in part, execution could have been issued against the grantor. The insolvency of Walker, would have increased the grantor's apprehension of suit or proceedings against himself, and of the fact there could be no better evidence, than judgments rendered against him, and the return of executions issuing thereon.

3. It is very clearly shown, we may say the fact is not questioned, that the conveyance now impeached, was of all the visible property of the grantor, subject to execution, and that when it was made, and from a date anterior, the close of the war, and the emancipation of slaves, he was insolvent. It is also shown clearly, we think, that his son, the grantee, was apprised of his insolvency. Their relationship, the gen-

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eral control of the business of the grantor, in consequence of his ill-health, which was entrusted to the son, the number of years after he became of age, during which he lived with, or near the grantor, and the mutual confidence they reposed in each other, are facts from which knowledge of the grantor's insolvency can justly be inferred. Here, then, are *indicia*, or badges of a fraudulent conveyance, and *bona fide* creditors have the right to require, that these shall be explained, and all unfavorable presumptions arising from them repelled by evidence, *first*, that the conveyance is founded on an adequate, valuable consideration paid or secured to the grantor.—*Crawford v. Kirksey*, 55 Ala. 293; *Hubbard v. Allen*, 59 Ala. 283. In the absence of clear and convincing evidence of this fact, the right and equity of the creditor must prevail. The evidence of the fact lies within the knowledge of the grantee; and the fact was of such recent occurrence, there could be no difficulty in producing it. It is so easy for parties standing in the relation of the grantor and the grantee to feign a consideration for the transfer of the property of the one to the other, and to fabricate the evidence of its payment, that the transaction can not be sustained, unless it is shown there was a real adequate consideration actually paid, and whatever there may be, not in the ordinary or usual course of such transactions, should be fully explained. When as in the present case, the consideration is large, amounting to several thousand dollars, there should be clear proof by the vendee, if his ability to purchase is questioned, of his means, or of the source from which he obtained the money. The absence of evidence of the disposition made by the grantor of the money it is alleged he received, becomes a material circumstance. Clear evidence of ability to make the purchase, is vital to sustain the transaction against creditors whose right to appropriate the property of the grantor to the satisfaction of their demands is clear, and founded on law and good conscience.—Bump, Fraud. Con. 92.

Without noticing the evidence in detail, we concur with the chancellor, that it is insufficient to establish the fact of payment. It may be the vendee had accumulated some money, but his evidence of the source from which he obtained the amount paid the vendor in the presence of witnesses, is too vague and indefinite to support a transaction attended with the *indicia* of fraud, which attend the conveyance to him. Where the money had been kept, if he had it on hand for any length of time prior to the purchase, could have been easily proved. Or, if not on hand, and it was obtained for

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the purpose of making the purchase, the persons from whom he obtained it, ought to have been examined. Some clear, satisfactory evidence that it was his money, not mere general statements as to the business in which he had been engaged, and the profits derived from it, it was his duty to have given. Not only is the evidence vague and indefinite as to the sources from which he obtained the money, but there is an absence of all evidence, as to the disposition made of it, by the grantor. He has not invested it in the purchase of other property which could be reached by his creditors—he has not applied it to the payment of debts, or if he has, he fails to nominate the creditors to whom it was paid,—he has it not in possession—and it is not credible, nor is it pretended, that in the time elapsing between the payment of it, and his examination as a witness, it had been expended in the support of himself and family. Under these circumstances, it is impossible to support the conveyance against creditors.

Another fact is unexplained, which casts suspicion on the transaction, and which could be removed only by clear evidence of fairness, good faith and an actual consideration, really paid, and justly disposed of by the grantor. In a short time, the grantee without valuable consideration, so far as is shown by evidence, conveys to his brothers, and brother-in-law, parts of the lands; himself, brother and sister, being the only children of the grantor. A division of the lands, all his estate of any value among his children, if he had been unembarrassed, and free to convey without a valuable consideration, is the disposition, the grantor would probably have made, at his advanced age, and in his state of health. That is the result, following the conveyance interposed to defeat the claims of his creditors, and how, and why it followed, is unexplained.

The relationship of the grantor and grantee, the known insolvency of the grantor, the pendency or apprehension of suits, on pecuniary debts or liabilities then existing, are but circumstances, and of themselves, may not justify the conclusion that the sale and conveyance is fraudulent. Whatever of unfavorable presumption may be drawn from them, is weakened and generally removed by the evidence of a full consideration actually paid.—*Montgomery v. Kirksey*, 26 Ala. 172. But as in the first instance, before the conveyance can be impeached, the creditor must prove the existence of his debt; when it was contracted, or that there were then creditors who could be hindered or delayed by it, the grantee to support the *bona fides* of the conveyance, when the indebtedness

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has been established, must prove that it is supported by a valuable consideration. In other words, claiming under the conveyance in opposition to the rights of creditors, he must prove a consideration adequate, of the kind expressed. If it be money paid as the price, the payment of the money must be proved; if it be a debt of the grantor extinguished, the existence and consideration of the debt must be proved. The circumstances surrounding the parties, the relationship existing between them, their subsequent conduct may demand higher and more convincing evidence of the fact of consideration than would be exacted if no relationship existed between them, if there were no circumstances surrounding them exciting just suspicion, and their subsequent conduct was consistent only with a fair sale and conveyance for a real consideration.—Bump on Fraud, Con. 96-8; *Hubbard v. Allen*, 59 Ala. 283. In criminal and in civil cases, presumptions arise from the connection of parties, the circumstances surrounding them, the motive these circumstances and the connection may create, which become conclusive, if unexplained. When explanation lies within the power of the party, the presumption strengthens, if it is not as full and clear as the party could and ought to have made it. *Hawkins v. Alston*, 4 Ired. Eq. 137; *Satterwhite v. Hicks*, Busbee (Law), 107. It is true, fraud is never presumed—that it must be proved by clear and satisfactory evidence, and when a transaction is susceptible fairly of two constructions, the one which will support and free it from the imputation of impurity of intention will be adopted. Fraud, like crime, may nevertheless be proved by circumstances—it is seldom capable of being proved otherwise—and the number or character of the circumstances which may amount to proof of it can not be defined. Each case depends largely on its own particular facts.

4. There is however an error in the decree of the chancellor which must be here corrected. After the conveyance to Whitmell F. Harrell, and before the filing of the bill, it is averred in the bill, he had conveyed parts of the land to his brother-in-law, and to other persons. The parts of the lands so conveyed are not designated, nor are these grantees made parties. They were necessary parties, if it was intended to subject the lands conveyed to them, and in their absence, it was erroneous to render a decree, under which the lands conveyed to them could be sold. The lands conveyed by Whitmell H. to his wife and children, are particularly described in the amended bill, and they are made parties de-

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fendant. The conveyance to them is voluntary, and their right is not superior to, but is infected with the taint of the title of the donor. These lands, and the lands averred to remain in possession of said Whitmell H., could properly be condemned to the satisfaction of the demand of the appellee. The remaining lands could not be, in the absence of the parties to whom they had been conveyed. In this respect, the decree of the chancellor will be here corrected, and as corrected, affirmed. It does not appear that the attention of the chancellor, or of the appellee, was directed to this error, and it would not be just under the circumstances, the appellee should be taxed with the costs of this appeal. Let the costs of the appeal be taxed against the appellant.

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Indictment for Robbery.

1. *Refusal of change of venue.*—As no appeal lies from the refusal of a change of venue, this court will not pass upon the sufficiency of the grounds for the ruling.

2. *Venire; what not ground for quashing.*—It is not ground for quashing the venire summoned for the trial of a capital offense, that it included the names of two of the regular jurors for the week, who, on a previous day, had convicted prisoner's co-defendant, as to whom there had been a severance; such persons may be challenged for cause.

3. *Challenge for cause; what not ground of, by prisoner.*—It is not ground of challenge by the prisoner, that a juror has a fixed opinion against capital or penitentiary punishment; neither can the prisoner complain of the action of the State in waiving such cause of challenge.

4. *Indictment for robbery; sufficiency of.*—In robbery, where the indictment describes the property taken from the person as "thirty dollars in greenbacks, national bank-notes, gold or silver coin of the United States," the property of a specified third person, it must be construed as a charge of taking "dollars of greenbacks, or national bank-notes, or gold or silver coin of the United States, and if the taking of any one of these things should not amount to robbery, the indictment would be bad.

5. *Same.*—The term "greenbacks" is a slang word, and by itself, without connection with something else indicating the notes called by that name, is not a proper denomination for them in an indictment; but in robbery the kind and value of the property so taken, is immaterial so long as it is of any value; and "greenbacks," designated in the indictment as "thirty dollars of greenbacks," having been ascertained by the verdict to be the property of the prosecutor, and feloniously taken from his person by violence,—the court properly passed sentence on the verdict.

APPEAL from City Court of Montgomery.
Tried before Hon. JOHN A. MINNIS.

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The indictment in this case charged that before the finding thereof, "Charles Wesley, *alias* Charlie Wesley, and Creed Scott, feloniously took thirty dollars in greenbacks, national bank-notes, gold or silver coin of the United States, the property of William Hamilton, from his person, and against his will, by violence to his person, or by putting him in such fear as unwillingly to part with the same, against the peace," &c.

There was a severance, and Wesley was tried, found guilty and sentenced in accordance with the verdict, to seventy-five years imprisonment in the penitentiary. The defendant was arraigned at the spring term, 1878, and the cause was continued. At the next term the defendant filed a sworn petition for change of *venue*, on the ground of local prejudice, setting forth at length the facts which, it was claimed, prevented a fair trial in Montgomery county. The bill of exceptions recites that the court overruled the application, "without hearing any evidence in support thereof, notwithstanding defendant offered to introduce testimony in support thereof." There were "no supporting affidavits offered with the petition, no specific witnesses tendered, or specific fact offered to be proved, but a general declaration of defendant's counsel, that they proposed to sustain the allegations of the petition by evidence, made after the case was called for trial, and a jury for the third time had been summoned by this court for the trial. The defendant separately and duly excepted to the refusal to hear evidence, and to the overruling of the application."

The defendant then demurred to the indictment on the following grounds: First, that "the term *greenbacks* used in the indictment is insufficient; second, that the description of the money specified in the indictment is too vague and uncertain; third, that the different kinds of money specified in the indictment can not be stated in the alternative; fourth, that the indictment charges no offense." This demurrer was overruled.

The defendant then moved to "quash the venire empannelled to try said cause, upon the ground that the regular panel on the venire, were the same that had been placed as the regular panel on the venire summoned to try Creed Scott, his co-defendant," but who had been separately tried and convicted on a former day of the week. In support of the motion, defendant showed "that two of the regular panels, West and Prickett, were on the jury which tried said Creed Scott." The court overruled the motion to quash, and

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defendant excepted. The court informed the prisoner that in event any juror was drawn, who had tried said Creed Scott, he might be challenged for cause, and he was allowed this right. Wilson Williams was drawn as a juror, who stated in answer to a question by the solicitor, that he "had no fixed opinion against capital punishment, but did have a fixed opinion against penitentiary punishment." The solicitor waived this objection, and the court pronounced him a competent juror, and he was accepted by the State. Defendant asked leave to challenge said juror for cause, but the court would not permit it, and he therefore challenged him peremptorily, and said "challenge was charged against him." Defendant separately and duly excepted to each of said rulings. The jury was completed, before defendant's challenges were exhausted.

JNO. GINDRAT WINTER, for appellant.—Our decisions go no further than to hold, that this court will not revise the exercise of discretion upon the facts presented for a change of venue. Here the court refused to *exercise* its discretion. It overruled the application without hearing evidence in support of it. The constitution gives the defendant the right to be *heard*, and in a case like this there is no other way to make that right effectual, than to reverse, because defendant was not heard. The court had no *discretion* as to whether it would *hear* defendant. A plain legal right was denied defendant. How can this court say that the lower court, in the exercise of its discretion, would have overruled the application, if it had heard the evidence?

2. The court erred in its ruling as to the juror Wilson. The law affixes death or imprisonment as the punishment on conviction of robbery. It is the defendant's right to have the juror *impartial*, not only as to guilt or innocence, but also as to the modes of punishment. The *law* says, under some circumstances, it is proper to imprison on conviction. The *juror*, says, in effect, that he will not carry out the law. He fixes death as the punishment, under all circumstances. Section 4883 of the Code is unconstitutional; for its effect is to deny an *impartial* jury. Murphy's case, 37 Ala. 142, does not show what answer the juror made. It may be, that the juror answered, that he had a fixed opinion against capital punishment. The waiver of this by the State, could not prejudice the prisoner—in event of conviction, the juror would only inflict the milder punishment. The error, if any, in that event would not injure.

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3. The indictment is fatally defective.—*Crocker v. State*, 47 Ala. 53. The term “greenbacks” is not known to the law. It must be shown that the thing taken was of value. Robbery is larceny aggravated by the force. In simple larceny, the value must be alleged and proved. Why hold that less strictness is required in the graver offence, than in the lesser one of simple larceny? In legal effect, this indictment charges merely that defendant took “something,” the property of Hamilton, &c. The disjunctive *or* requires that everything mentioned as taken, should be the subject of larceny.

H. C. TOMPKINS, Attorney-General, *contra*.—The indictment was sufficient.—*DuBois v. The State*, 50 Ala. 139; *Grant v. The State*, 50 Ala. 139; 29 Mich. 232; *Sawtelle v. Commonwealth*, Cush. 142.

2. The ruling upon change of venue is not revisable. Such ruling not being revisable, it is immaterial what reasons were given for it.

3. The regular jurors, the law required to be put on the list served on the prisoner. It is to make up for disqualification among these, that the extra jurors are summoned. The court allowed challenges for cause, as to the Scott jury, and that was all appellant was entitled to.

4. A fixed opinion against capital or penitentiary punishment, is cause of challenge by the State only. The defendant has no right of challenge on either ground. He can not complain of the State's waiver of cause of challenge.—37 Ala. 142.

MANNING, J.—It is settled here, that no appeal lies for the refusal by the primary court, to order a change of *venue* in a criminal cause.—*Kelly v. The State*, 52 Ala. 361. It follows that this court will not inquire into the reasons for such a refusal when a cause is brought here after final judgment below. It would be useless to examine into considerations upon which a ruling was made which, if wrong, it is not within our province to correct.

To constitute the jury that shall try a defendant charged with a capital offense, the court must make an order for the summoning of “not less than fifty nor more than one hundred persons, including those summoned on the regular juries for the week.”—Code of 1876, § 4874 (4173). A motion was made to quash the *venire*, because among the persons so summoned, were two from “the regular juries for the week,” who had a few days before served as jurors in the trial of

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one Creed Scott, and found him guilty of the same offense of robbery, and under the same indictment as that upon which the present defendant was prosecuted. They were jointly indicted, but a severance was allowed that they might be separately tried. The judge refused to quash the *venire*, but permitted defendant to challenge such persons for cause, in the formation of the jury.

It is commonly supposed to be a right of the defendant which the court must respect, to have all the jurors empanelled for the week summoned among the persons from which the special jury in a capital case shall be constituted. It would doubtless have been alleged as matter for just complaint, if any of them were, without cause, omitted from the *venire*. How could the judge and sheriff know that the same jurors would render the same verdict against two different defendants separately tried for the same offense, or that the prisoner to be tried might not be so assured of its being shown that he was innocent, as to desire the very persons to serve as jurors in his case, who had heard the evidence and rendered a verdict against the other defendant? It was certainly lawful, if not a right on which defendant could insist, that the persons serving on the regular juries for the week should be summoned to serve, if selected, upon the jury for his trial.—See *Floyd v. The State*, 55 Ala. 61. The Circuit Court did not err in overruling the motion.

It is the right of the State, not that of the defendant, to challenge for cause a person offered as a juror who has a fixed opinion against capital or penitentiary punishments.—Code, § 4883 (4182); *Murphy v. The State*, 37 Ala. 142. The judge did not err in putting Wilson Smith upon defendant as a competent juror, and refusing to exclude him unless challenged peremptorily.

The indictment charges robbery, in feloniously taking “thirty dollars in *greenbacks*, national bank-notes, gold or silver coin of the United States, the property of William Hamilton, from his person and against his will, by violence to his person, or by putting him in such fear as unwillingly to part with the same,” &c. There being no copulative conjunction in that part which is designed to be the description of the things alleged to have been so taken, and it being against the rules for the interpretation of such instruments, to support an indictment by implications, we must construe the charge as in the alternative,—that defendant “feloniously took thirty dollars of *greenbacks*, or national bank-notes, or gold or silver coin of the United States,” &c. And

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if such taking of any one of these things should not amount to robbery, the indictment would be defective.—*Danner v. The State*, 54 Ala. 127; *Daniel v. The State*, (at this term.)

In the grave and formal accusation of a grand jury, by which a person is put on trial for his liberty or life, things which are the subject of an alleged larceny or robbery, should be called or set forth by the names or words which properly designate or describe them. "Greenbacks" is but a nickname, originally, or slang word, derived from the color of the engraving on the backs of the currency so denominated, and not either the legal designation, or a proper description of the things alleged to have been feloniously taken. The fact that the word has, from its conveniency, come into common use, does not make it by itself, without connection with something else indicating the notes called by that name, a proper denomination for them in an indictment.—*Grant v. The State*, 55 Ala. 201.

However, we can not hold that the indictment is, on that account, fatally defective. The crime it charges against the defendant is robbery. This is defined to be "the felonious and forcible taking of the property of another from his person, or in his presence, against his will, by violence, or by putting him in fear."—2 Whar. Amer. Cr. Law, § 1696, (6th ed.); Archbold, 418. In this offense the kind and value of the property so taken, is not material, because force or fear is its main element. Hence, when a man was knocked down and his pockets rifled, but the robbers found nothing but a piece of paper having a memorandum on it, an indictment for robbing him of the paper was held to be maintainable. It was held sufficient if of some value, however little, to the person robbed.—*Rex v. Bingley*, 5 Car. & P. 602; *State v. Burke*, 73 N. C. 83.

In this cause, the indictment charges and the verdict ascertains that these "greenbacks," described to be "thirty dollars of greenbacks," &c., were the *property* of one Hamilton, and were feloniously taken by defendant, from said Hamilton's person against his will by violence to his person, or by putting him in fear. This was robbery.

Let the judgment of the City Court be affirmed.

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Action on Promissory Notes.

1. *Contract ; what illegal.*—It is settled, beyond further controversy in this court, that a contract made here during the late war, for the sale of property which the vendor knew the purchaser was buying, to enable him to furnish material to the Confederate States, to aid in the prosecution of hostilities against the United States, is void, and can not now be enforced.

2. *Same.*—There is no difference in principle between such a sale when made directly to the Confederate States, or its agent, and a sale made to an individual who, it was known, expected to profit by it in making contracts with the Confederate States.

3. *Illegality of consideration ; how must be proved.*—Illegality of consideration will not be inferred, when the evidence can reasonably and justly be reconciled with the hypothesis of legality, and he who asserts it, must prove it ; but need not remove all reasonable doubt, as in criminal cases, but will be sufficient if it produces the degree of conviction essential in civil cases.

4. *Parties in pari delicto.*—The law does not look with favor or disfavor, as between the parties, upon either party to a contract made in violation of law or public policy, but declares them in *pari delicto*, and abstains from all interference between them.

APPEAL from Circuit Court of Dallas.

Tried before Hon. GEO. H. CRAIG.

Appellant, Horace Ware, brought suit against the appellee, A. T. Jones, on certain promissory notes made by the latter to the former on the 11th day of August, 1862, payable respectively, on 1st of April, and 1st of August, 1863.

The defendant pleaded, among other things, that the sole consideration of the note was the purchase of certain real and personal property, in which defendant retained an interest, with the intention on the part of both plaintiff and defendant, to use said property, which consisted of a rolling mill and furnace, in making guns, shell and other war material, "for the purpose of using the same in aid of a certain rebellion, in which plaintiff and defendant, and divers other persons were then engaged against the United States."

Issue was joined on this and other pleas, which need not be noticed, and there was a verdict and judgment for the defendant.

The evidence shows that in March, 1862, Ware owned a large iron property in Shelby county, upon which was a rolling mill and foundry. He had offered this property for sale both before and after the breaking out of the late war, and

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was anxious to sell a large portion of it with a view of forming a joint stock company or corporation. For this purpose he offered to sell an interest in six-sevenths of the property. On the 18th day of March, 1862, Jones and five others entered into a contract for the purchase of six-sevenths interest in the property. This agreement was afterwards consummated in August, 1862, when Ware conveyed to a corporation which had been formed by himself and associates, each receiving shares of stock representing his interest. Part of the price was paid in cash, and for the deferred payment each of the purchasers executed his individual note for his respective share. The notes thus given by Jones are the foundation of this suit.

The evidence shows that before the contract of purchase, Jones and his associates visited an agent of the Confederate States, to ascertain, in the event of their purchase, whether they could procure a contract to manufacture iron for the Confederate States, and received assurances that the Confederate government would make a contract to take the iron, and would also advance money to enable them to manufacture the iron. This determined them to purchase, with the view of "making such contract, if they could." The evidence on the part of the plaintiff tended to show that he was not informed of this, and had no such intent in making the sale, while the evidence on behalf of defendant tended to show that the plaintiff was aware of their purpose and participated in it. Before this sale was made, defendant had a contract to furnish iron to McIlvaine & Co., who were manufacturing guns for the Confederate States, and the agreement of sale authorized him to carry out this contract, but nothing is stated in the agreement as to the purpose for which the iron was furnished, or the relation that McIlvaine & Co. bore towards the Confederate States. After the sale, the associates, who had then formed a corporation, in which Ware was a director, made a contract with the Confederate States for the sale of iron, and continued to furnish it until the close of hostilities, and Ware was surety on a bond executed to the Confederate States, to secure the repayment of moneys advanced by it, on the contract.

The court charged the jury, among other things, "if the consideration of the notes was property sold by the payee during the war, to the maker, to be used by him in aid of the rebellion against the United States, and the purpose for which it was to be used was known to the vendor at the time

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of the sale, the note is void, and no action can be maintained on it." The plaintiff excepted to this charge.

The court further charged the jury, "if the evidence satisfied them that the defendant and his associates were induced to enter into the contract by assurances from the agent of the Confederate government that a contract could be made with it to advance money to improve the property proposed to be bought, and to take the iron, and if the jury further believe that defendant and his associates bought said property and entered into said contract with the intention of making iron for and in aid of the Confederate States, and if they are further satisfied that at the time of making said contract, Ware knew the defendant and his associates intended and proposed making the contract in order that they might manufacture iron in aid of said government, then this contract would be void, and plaintiff can not recover on the notes sued on." The plaintiff excepted to this charge.

The plaintiff asked a charge asserting the converse of the foregoing charge, and excepted to the refusal to give it.

He also asked the following written charges: "There is a material difference in the case in which one man sells property to the Confederate States for its use, or to its agent, and in the case where property is sold to persons who buy it for their own benefit, and expect and intend to promote their profits, by making a contract with the Confederate States to manufacture iron for, and sell the same to the Confederate States."

The law does not favor defenses based on the alleged illegality of contracts when made by purchasers against paying the purchase-money of property. The defense in such case is regarded as dishonest and immoral, and to render it available the defendant must prove it clearly."

The court refused each of these charges, and the defendant separately and duly excepted.

The charges given, and the refusal to charge as requested, is now assigned as error.

BROOKS & ROY, and WHITE & WHITE, for appellant.—At the time of the purchase, there had been no contract with the Confederate government for any purpose, and the making of one depended; *first*, whether the iron company should be organized; *second*, whether if organized it would find it to its interest to make such a contract; *third*, whether the company would be able to agree on the terms of a contract with the Confederate government. It is a knowledge of this state

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of facts which it is claimed invalidates the notes. Knowledge of a purpose so vague, uncertain and undefined, and subject to so many contingencies, can not invalidate a contract otherwise lawful. In the Oxford iron cases, the act done was unlawful without reference to any contingency. The sale in itself was unlawful there; for the Oxford Iron Company not only had contracts with the Confederate States, but was known to be carrying them out. In *Hanauer v. Doane*, the vendor knew the purpose of the purchase, and that the vendee had no idea of putting the supplies to any other use.—See *Armstrong v. Toller*, 11 Wheaton, 258; 4 Burr, 206; 3 Term Report, 419; 25 Ala. 483; 54 Mo. 409. These cases come near repudiating the maxim, "*ex turpi causa non oritur actio*."—See, also, *Brooks v. Martin*, 2 Wallace, 70; 2 Phillip Ch. 801; *Schable v. Bacho*, 41 Ala. 437. This contract was complete without the illegal design; it would have been entered into, though no contract could have been made with the Confederate States.

During the war, neither the laws of the United States nor any policy of the government was in force in any part of the Confederate States not under the control or in the possession of the United States.—*Bier & Mason v. Dozier*, 24 Grattan, 1; *Ruckman et al. v. Lightner's Executors*, 24 Grattan, 19. When the contract was made it was lawful according to the then dominant authority, and could have been enforced in the courts of the Confederate States. Being lawful when it was made, a change of government would not render it unlawful; to make it unlawful it must have been made in violation of the laws to which the parties then owed obedience.—Authorities *supra*.

If in carrying out the contract now the defendant insisted upon any act, or the performance of anything in contravention of the laws or public policy of the United States, the court might well refuse to interfere. But no such result is sought by plaintiff; he seeks simply to collect a debt for property sold and conveyed to the defendant—not having in view any violation of existing laws.—24 Grattan, 1.

The last charge asked should have been given. The law does not favor defenses based upon the alleged illegality of contracts, when made by purchasers against paying the purchase-money for property. The defense in such cases is regarded as dishonest and immoral—*Oxford Iron Co. v. Spradley*, 46 Ala. 98-107—and must be clearly proved. Chitty on Contracts, 514, 515; Addison on Contracts, 91. The presumption of law is in favor of a contract. If reason-

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ably susceptible of two meanings, that interpretation shall be put upon it which will support and give it operation. It is for the party who makes the objection to prove it clearly. Chitty and Addison, *supra*.

MORGAN, LAPSLEY & NELSON, and PETTUS, DAWSON & TILLMAN, *contra*.—The parties, by their conduct, made “a direct contribution to the resources of the Confederate government.”—*Lockhart v. Horn*, 1 Wood’s Rep. 639; *Oxford Iron Co. v. Spradley*, 46 Ala. 99; *Oxford Iron Co. v. Quinchette*, 44 Ala. 491; *Lockhart v. Horn*, 17 Wall. 570; *Milner, Wood & Wren v. Patton*, 49 Ala. 423. In this latter case *Thedford v. McClintock*, 47 Ala., was overruled on this point. In *Milner, Wood & Wren v. Patton*, *supra*, the leading case of *Hanauer v. Doane*, is referred to and approved.—*Hanauer v. Doane*, 12 Wall. 342.

In the case of *Clugos v. Penalula*, 4 Dunn & East, 466, the mere fact that plaintiffs had “packed” the goods for defendant, was held to be an assistance to defendant in *smuggling*. See, also, *Riggs v. Lawrence*, 3 Dunn & East, 453; 21 Vermont, 188; 2 Mees & Wel. 153; 3 Barn. & Ald. 179; 1 Maule & Sel. 593; 3 Mees & Wels. 434; 3 McLean, 278; 7 Wall. 542; 4 Peters, 436; 11 Wheat. 258. See, also, United States Statutes at Large, p. 319, vol. 12.

The last two charges requested by plaintiff were erroneous. The *intent* with which the sale was made, and not the party with whom it was made, whether with the principal or through his agent, or a private individual who intends to use the property for the Confederate States, which determines its validity. In the absence of evidence to the contrary, an unlawful intent will not be presumed, and where it is set up it should be clearly proved; but the law does not stamp the defense of illegality of consideration as “dishonest,” immoral, &c. The charge would, manifestly, have misled the jury.

BRICKELL, C. J.—The instructions given the jury, and the first instruction requested by the appellant and refused, involve the same question—the validity of a contract made during the war, for the sale of property real and personal, the seller knew the purchaser was buying, to be used in the making of iron for the Confederate States, to aid and assist them in the prosecution of hostilities against the United States. The question has been several times, in various

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forms, presented to this court, and with one exception, such contracts have been declared void.

In *Shepherd v. Reese*, 42 Ala. 329, a horse was purchased, the note given for the price, expressing that the horse was "to go in Captain Smith's mounted company, the horse to be paid for as he draws his money." The proof showed the horse was purchased for use in the service of the Confederate States. The question was, whether a recovery could be had on the note. The court pronounced it void, as opposed to the national policy and the constitution. At the succeeding term, in *Patton v. Gilmer*, 42 Ala. 548, the facts were that the State of Alabama had advanced a large sum of money to an association or corporation, organized for the manufacture of arms, upon a contract to deliver to the State, arms of a certain number and description, and the corporation had given bond for the performance of the contract. The action was upon the bond, assigning several breaches of the contract, and it was held the action could not be maintained. The principle of the decision, is, that all contracts which are hostile to, or violative of the constitution or laws of the United States, are invalid, whether made by individuals, or the State. And that though the contract was made during the war, when the authority and laws of the United States were by force superseded, and the authority and laws of the Confederate States were dominant, it can not now be enforced in the courts of the State, bound to the constitution of the United States, as the supreme law of the land. In *Oxford Iron Company v. Quinchett*, 44 Ala. 487, a contract for the loan or hire of mules to a party, known at the time to be engaged in the manufacture of iron for the Confederate government, with a knowledge on the part of the bailor, that they were to be employed in the work, was declared invalid. In *Oxford Iron Company v. Spradley*, 46 Ala. 98, a promissory note given by a corporation for the loan of money, to be used in erecting iron works and making iron for the Confederate government, if at the time of the loan, the lender knew the purposes for which it was borrowed, was pronounced void. In *Milner v. Patton*, 49 Ala. 423, the action was on an account for goods sold and delivered, the seller knowing the purchaser intended to use them in clothing Confederate soldiers, and it was held the action was not maintainable. Opposed to these cases, stands the case of *Thedford v. McClintock*, 47 Ala. 423, which was expressly overruled in the case of *Milner v. Patton*, *supra*.—See, also, *Bibb v. Commissioner's Court*, 44 Ala. 119; *Speed v. Cocke*, 57 Ala. 209.

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These decisions must be taken as settling definitely, and finally, the law of this State, upon the question now involved; as they are supported by the decisions of the Supreme Court of the United States, though they may be opposed to the decisions of other States, we are not inclined to re-open a discussion of the reasoning on which they proceed.—*Hanauer v. Doane*, 12 Wall. 342; *Hanauer v. Woodruff*, 15 Wall. 439. The act of Congress of August 6, 1861, (U. S. Stat. vol. 12, 319), subjected to confiscation, property of any kind or description purchased or acquired, or sold, with intent to use or employ the same, or to suffer the same to be used or employed in aiding, or abetting or promoting the insurrection. The property in this case was not only sold with a knowledge that it was to be so used, but the seller was a member of the corporation formed to promote the use, and suffered it to be used first in the completion of a contract he had made to supply a contractor with the Confederate States, with iron for making arms, and then in supplying the government itself. Such at least, there was evidence tending to show, and it was in reference to the evidence the instructions were given and refused. Contracts prohibited by a statute, even when a penalty is not imposed for a violation, are void. *McGehee v. Lindsay*, 6 Ala. 16. It is said this statute was not operative in Alabama when this contract was made. But it is now of force, and as obligatory on the courts of justice within the State, as if Alabama had then as now recognized the constitution and laws of the United States, as the supreme law. The answer of JUDGE, J., to a similar argument in *Shepherd v. Reese*, *supra*, was: "The contract stands, therefore, as one executed in a foreign government; and testing its legality by the *lex loci contractus*, it must be pronounced to have been a valid contract at the time and place it was made. But can it be enforced in a court acting under the authority and constitution of the United States? We understand the law to be well settled, that it can not be if it is opposed to the national policy or national constitution?" In the instructions given and refused, we are considering, the Circuit Court did not err.

The second instruction requested by the appellant, asserts there is material difference between a sale to the Confederate States, or to its agents for its use, and a sale to an individual, who expected to profit by it in making contracts for its use with the Confederate States. The instruction does not point out, in what the difference consists. The guilty knowledge of the seller, which avoids the contract may be more appa-

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rent in the one instance, than the other, from the character of the person with whom the contract is made. But in the legal consequences resulting from the contract, there is no difference. The reason in either instance the contract is held void, is, because it can not be reasonably supposed, that a party knowing another intended an illegal purpose, would directly or indirectly furnish the means of accomplishing it, if he did not intend to aid and assist it.—*Degroot v. Van Duger*, 20 Wend. 390; *Hanauer v. Doane*, *supra*; Story's Con. Laws, §§ 253, 254.

Expressions may be found in judicial decisions, and in text books, which seem to cast reproach on a party resisting the performance of contracts into which he has voluntarily entered, because of their illegality, and would indicate that the law looks upon the defense with disfavor. Similar expressions may be found in reference to the statute of limitations, and at one time, courts were so far led astray by them, that the statute lost much of its vigor. Such expressions are the individual opinions of the judge, or the text writer, employing them, and are not to be accepted as rules of law. The law does not regard the defense with favor or disfavor—it does not inquire whether there are or are not circumstances in the particular case, which render the defense immoral and dishonest, or render it meritorious, and a shield to the party making it, from an unconscionable demand by his adversary, who may be cruelly standing on the *letter of the bond*. The law does not look with favor or disfavor to the one party or the other, declares them *in pari delicto*, and abstains from all interference between them.

The presumption of law is in favor of the legality of contracts, and when on the court is devolved the duty of construction, if it is fairly and reasonably susceptible of two interpretations—one rendering it legal, and the other illegal, that interpretation will be adopted which will support, rather than that which will defeat it.—1 Brick. Dig. 386, § 164; 2 Chit. Con. 977. Following out the principle, illegality of consideration will not be inferred, when the evidence is justly and reasonably capable of being reconciled with the hypothesis of legality. The general rule applies, that fraud or illegality, is not to be presumed; the party affirming the one or the other, must prove it clearly, if it is denied.—2 Chit. Con. 978. It is enough, however, if the evidence is sufficient to produce in the minds of the jury that degree of conviction essential in civil cases—it is not necessary as in criminal cases, that it should remove all reasonable doubt. If the

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appellant had requested the court simply to instruct the jury, that the defense in the present case ought to be clearly proved, we do not inquire whether the instruction ought to have been given—without an explanation, it would have probably misled; and instructions requested which without explanation, may mislead, are properly refused. The instruction as to the clearness of the evidence, was connected with the affirmation, that the law disfavored the defense as immoral and dishonest, which was not correct, and being incorrect in part, was refused properly; for it was not the duty of the court to analyze the charge disconnecting the correct from the incorrect.

Let the judgment be affirmed.

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Bill in Equity to Foreclose Mortgage.

1. *Invalidity of mortgage of lands; purchaser at execution sale, when estopped from asserting.*—One buying lands which the vendor had encumbered by mortgage, to secure a debt to a third person, and expressly agreeing with the seller and the mortgagee to pay such debt, which is deducted from the cash payment required, subordinates his title to the mortgage, and is estopped from denying its validity; and the mortgage being duly recorded, a purchaser of the lands at a sale on execution against the vendee, merely succeeds to his rights, and is also bound by the estoppel.

APPEAL from the Chancery Court of Wilcox.

Heard before Hon. CHARLES TURNER.

The appellee, Sterling Brown, filed this bill against Francis and Mary Dulaney, Moore & Moore, and Kennedy, to foreclose a mortgage on certain lands, executed by Dulaney and his wife, and also asserting a vendor's lien on the land.

The case made by the bill, answers and testimony was this: The lands were originally the statutory estate of Mrs. Dulaney. Brown loaned her some money, which he contended was to purchase articles of comfort and support, &c., and she and her husband executed a note therefor, secured by mortgage on the lands. This mortgage was duly executed and acknowledged by Mrs. Dulaney and her husband, and recorded. After this, Mrs. Dulaney and her husband, by deed duly executed and delivered, sold and conveyed said lands, which had already been mortgaged to Brown, to Moore

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& Moore. It was expressly agreed and understood orally between the Moores, Dulaney and his wife, and Brown, that the latter should have a lien on the land to the extent of the indebtedness of the Dulaneys to Brown, and the Moores agreed to pay it. The amount of this indebtedness, together with that of some debts of Mr. Dulaney to the Moores, was deducted from the cash payment, and the Moores executed their notes to the Dulaneys for the balance. The Moores entered into possession. After this, Kennedy obtained a judgment against them, and became the purchaser of the lands at execution sale. He had notice of the mortgage before his purchase, but not of any vendor's lien. Mrs. Dulaney in her answer set up the invalidity of the mortgage. The Moores did not defend, and decrees *pro confesso* were taken as to them. The chancellor decreed that Brown was entitled to relief, and had a lien on the lands, but subordinate to the lien of the note to Mrs. Dulaney for the purchase-money, which was secured by a mortgage from the Moores, and that the lands be sold, and after paying the costs and the amount due Mrs. Dulaney, so much of the residue as was necessary should be applied to the payment of the debt due to appellee. Kennedy appeals from this decree, and here assigns it as error.

COCHRAN & DAWSON, for appellant.—The mortgage to Brown was absolutely void.—*Bibb v. Pope*, 43 Ala. 190; 58 Ala. 518. Mrs. Dulaney could not transfer any part of the debt due by the Moores to her, except by instrument in writing signed by herself and husband and witnessed.—43 Ala. 654. This was done. Not having procured any transfer of any of the debt due by the Moores for the purchase-money, Brown had not and could not acquire a vendor's lien. The agreement between the parties to assume Brown's debt was verbal, and void under the statute of frauds. Kennedy had no notice of any vendor's lien. If he had notice of the mortgage, it was notice of a void instrument, which did not affect the title. He was a *bona fide* purchaser, and protected against equities of which he had no notice.

JONES & JONES, *contra*.—The statute of frauds has no application, because a part of the purchase-money was paid and the purchasers went into possession.—28 Ala. 274; 19 Ala. 481; *Byrd v. Odem*, 9 Ala. 755, and authorities cited. Besides, in this case, not only was there possession by the purchasers with the consent of the vendors, but a deed was made by the vendors and a mortgage executed by the vendees

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on the lands, to secure the unpaid purchase-money, and from the cash payment the appellee's note was deducted.—*Adams v. McMillan's Ex'r*, 7 Por. 73.

2. Equity will at all times lend its aid to defeat a fraud, notwithstanding the statute of frauds.—Browne on Statute of Frauds, § 437.

3. The proof shows that the appellant was a purchaser of the Moores' interest in the lands at sheriff's sale, with notice of complainant's lien on the lands — *Williamson v. Br. B'nk of Mobile*, 7 Ala. 906. The Moores got the benefit of the Dulaney's indebtedness to Brown on their trade for the land, and Kennedy, the appellant, who purchased their interest at sheriff's sale, can make no defense that they could not have made.

BRICKELL, C. J.—It is an undisputed fact, that the Moores expressly assumed and promised to pay the amount of the mortgage debt due to the appellee from Dulaney and wife, as a part of the purchase-money of the premises. It is also undisputed, that the amount was deducted from the purchase-money they had contracted and were bound to pay presently. Whether the debt was binding on Mrs. Dulaney, or the mortgage was valid and operative as a security, as between the appellee and Mrs. Dulaney, is not now a material question. The only title which the Moores acquired, by their own agreement, on a full and fair consideration, they subordinated to the mortgage, and they are now estopped from disputing its validity.—*Bunkley v. Lynch*, 47 Ala. 211; *Comstock v. Smith*, 26 Mich. 306; *Freeman v. Auld*, 44 N. Y. 50; 1 Jones on Mortgages, §§ 749-754. Whether the verbal agreement that the appellee should have a vendor's lien on the lands, as a security for the debt, can be enforced, it is not necessary to inquire. The invalidity of that agreement can not lessen the liability of the Moores to pay the debt, or if they do not, to allow the lands to be applied to its payment.

The estoppel resting on the Moores is equally binding on the appellant, who has merely succeeded to their rights, and to whom the registration of the mortgage was constructive notice. A person claiming title under one who is estopped, in the absence of some superior equity, is bound by the estoppel.—*McCravey v. Remson*, 19 Ala. 430; *Sikes v. Basnight*, 2 Der. & Bat. (Law) 157.

There is no error in the record prejudicial to the appellant, and the decree is affirmed.

[Marks v. Cowles.]

Marks v. Cowles et al.

Supplemental bill to Vacate sale of Lands, under Decree which has been Reversed.

1. *Judicial sale; when not affected by reversal of decree under which it is made.*—The title of a stranger purchasing lands at judicial sale under an erroneous judgment or decree, will not be defeated or impaired by a subsequent reversal of the decree.

2. *Same; when reversal defeats.*—Where a party to the decree, purchases under an erroneous judgment or decree in his own favor, he acquires a defeasible title only, which fails upon a subsequent reversal of each judgment or decree.

3. *Same.*—The assignee of one who purchased under an erroneous decree in his own favor, stands in the shoes of his vendor, and a subsequent reversal defeats his title also; and the judgment or decree being the foundation of the title, the assignee or vendee of such purchaser is bound to take notice of, and therefore not entitled to protection as a *bona fide*, for value, without notice.

APPEAL from the Chancery Court of Montgomery.

Heard before Hon. H. AUSTILL.

The facts of this case were fully reported when it was here on former appeals.—See *Cowles v. Marks*, 47 Ala. 612, and *Marks v. Cowles*, 53 Ala. 499.

The facts, so far as material to the question here involved, are as follows: The original bill was filed by appellant's testator against George Cowles, and Laura, his wife, to subject certain lands to the payment of unpaid purchase-money. Laura, being a married woman at the time of the purchase, filed a cross-bill, asserting a right to charge the lands with the reimbursement to her of moneys of her statutory estate used in making the cash payment on the lands. The Chancery Court having denied her such relief, she appealed to this court, which reversed the decree of the Chancery Court. In accordance with the principles announced in the opinion on the first appeal, the Chancery Court in June, 1872, rendered a decree for the sale of the lands. The lands were sold under the decree, on the first Monday in October, 1872, and bought by the defendant, Laura Cowles. On the 20th day of December, 1872, Marks took an appeal to this court, but did not supersede the execution of the decree. On the 16th day of May, 1873, the sale was confirmed, and conveyance duly executed to the purchaser. On the 9th day

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of September, 1875, Singer purchased the lands from Cowles and wife, received a conveyance, and holds possession thereunder. On the 16th day of December, 1875, this court reversed the decree under which the sale was made. After this, Marks having died, suit was revived in the name of appellant as executrix. Appellant then made a motion to set aside the sale, and Singer filed a petition alleging his interest, and that he had purchased *bona fide*, &c., and prayed to be allowed to appear and resist the motion. The chancellor denied the motion to vacate the sale, but without prejudice to the right to file a supplemental bill, which he indicated was the proper practice.

Appellant thereupon filed a supplemental bill, alleging the foregoing facts, praying that the sale be vacated, and that Singer be decreed to surrender possession.

The answer of Singer, which was adopted by the other defendants, admits the facts as before stated. It states further, that Singer has paid a fair price for the lands; that he lived nearly one hundred miles from Montgomery; that he had no knowledge of the pending appeal, or the rights or claims of complainant in the premises, and that he was induced to purchase after seeing the register's deed to said Laura, upon the opinion and advice of her counsel that she had a good title, &c.

No testimony seems to have been offered as to the matter of the supplemental bill, and the whole matter appears to have been submitted in the supplemental bill and answers.

The chancellor being of opinion that Singer's title was not affected by the reversal, and the case not being one justifying a personal decree, decreed that appellant was not entitled to further relief, and ordered the cause to be dropped from the docket.

P. T. SAYRE, for appellant.—If Mrs. Cowles had retained the lands, beyond all question, her title would have been destroyed by the reversal of the decree. In *Dupuy v. Roebuck*, 7 Ala. 486, it is said: "A judgment reversed, becomes mere waste paper, and the rights of the party immediately on reversal, are restored to the same situation in which they were prior to the pronouncing of the judgment so reversed." See *Barrenger v. Burke*, 21 Ala. 771.

This being the law, the sale which was made, must fall with the reversal.

Can Singer occupy any better position than Mrs. Cowles? He was bound to inquire into her title. He was chargeable

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with notice as to the manner in which she acquired title. *Johnson v. Thweatt*, 18 Ala. 742. And he was chargeable with notice that an appeal was pending when he purchased. The fact that he was advised by lawyers that Mrs. Cowles could make a good title, can afford him no relief. It is his misfortune if his lawyers gave wrong advice.

At the very time he purchased, the case was pending in the Supreme Court, and it involved the particular property, so that the doctrine of *lis pendens*, must necessarily apply. *Bishop of Winchester v. Payne*, 2 Vesey, 195; *Murray v. Banon*, 1 John. Ch. 576; *Harris v. Carter*, 3 Stew. 238; *Jackson v. Caldwell*, 1 Cow. 649; *Taylor v. Thompson*, 5 Pet. 370; *Doe ex. dem. Chaudron v. Meyer*, 8 Ala. 570; *Boling v. Carter*, 9 Ala. 921; *Hoole v. Paullin*, 22 Ala. 190; *Spencer v. Goodwin*, 30 Ala. 338; *Creighton v. Payne*, 2 Ala. 158; *Trammell v. Simmons*, 8 Ala. 271; *Carter v. P. & M. Bank*, 22 Ala. 743.

J. T. HOLTZCLAW, and BRAGG & THORINGTON, *contra*. We insist that under the facts, Singer was a purchaser for value, without notice, and is not affected by subsequent reversal of the decree.—See Reese on Judicial Sales, § 431, note 1, and authorities cited.

The authorities are thus stated by their author to have been correctly announced by the Supreme Court of Illinois, as follows:

“If the court has jurisdiction to render the judgment or to pronounce the decree; if it has jurisdiction over the parties and the subject-matter, then upon principles of universal law, *acts done and rights acquired by third persons under the authority of the judgment or decree, and while it remains in force, must be sustained, notwithstanding its subsequent reversal.*”—Rorer on Judicial Sales, § 431; 36 Ill. 319; 11 Ill. 523; 26 Ill. 179; 2 How. 340; 14 Ohio St. 350; 3 Ohio St. 389; see, to same effect, Brickell's Digest, p. 773, § 1771, and authorities there collected.

It is undoubted, and not denied, that the Chancery Court had jurisdiction of the subject-matter and the parties.

We insist that the doctrine of *pendente lite* can not be invoked here, and has no application to the facts of this case. Here was a sale by the court of the subject-matter in controversy upon a decree regularly rendered, which sale was duly confirmed and a deed made to the purchaser, and a stranger, upon the faith of this judicial action, parts with his money, takes a conveyance, and can not now be placed in *statu quo*.

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Pendente lite can be invoked when a party to a pending suit sells or disposes of his interest, which can not, during litigation, change the rights of the parties, or the power of the court over the subject-matter of the suit.

Here the court sells and conveys, not only the interest of one party, but the subject-matter of the suit itself, and the interest of each and all the parties thereto, and in the hands of a *bona fide* purchaser for value. That subject-matter is the power of the court to disturb. It is a judicial sale that no subsequent reversal affects.—*Wyman v. Campbell*, 8 Port. 218; *Pilfield et al. v. Guzzar*, 2 Ala. 328; *Vorhies v. Bank U. S.* 10 Peters, 478.

The court declared, in 47 Ala. 612, Mrs. Cowles' equity superior to Marks'. Following that decision is the decree, sale and confirmation of the identical property the subject-matter of this suit; and while existing as the law of the land, Singer purchases for value. We say he had a right to rely upon the law as adjudicated by the highest tribunal in the land. *Gilpeche et al. v. City of Dubuque*, 1 Wall. 175; *The City v. Lamsen*, 9 Wall. 478.

BRICKELL, C. J.—Waiving all consideration of the mode of procedure in the court of chancery, adopted by order of the court, and of the regularity of which, no complaint is made, we direct our attention exclusively to the questions, on which the rights of the parties finally depend. The principle is, whether a purchaser from a party to a pending appeal, of lands, the party had acquired under a sale made in execution of the decree, having notice actual or constructive of the appeal, obtains a title which will not be defeated by the reversal of the decree.

The general principle, that a judgment or decree reversed by a competent jurisdiction, ceases to exist as between the parties—in the strong language of some authorities, *becomes mere waste paper*—and that every right and interest springing out of, and dependent upon it, acquired by the party in whose favor it was rendered, shares its fate and falls with it, has been frequently asserted, and underlies numerous decisions of this court.—*Judson v. Eslava*, Minor, 71; *Duncan v. Ware*, 5 St. & P. 119; *Dupuy v. Roebuck*, 7 Ala. 484; *Burdine v. Roper*, ib. 466; *Stewart v. Conner*, 9 Ala. 803; *Simmons v. Price*, 18 Ala. 405 (S. C.); 21 Ala. 337; *Barringer v. Burke*, 21 Ala. 765; *Williams v. Simmons*, 22 Ala. 425; *Pauling v. Watson*, 26 Ala. 205; *Ewing v. Peck*, ib. 413. The reversal deprives the judgment or decree of all force or

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benefit in favor of the party obtaining it, and of all capacity to injure the party against whom it was rendered. For acts, which would have been trespasses, without the authority of the judgment, done while it was of force, and for which it then afforded justification, it may continue after reversal to protect the party. Thus far, he may be permitted to use the judgment defensively, but he can not use it offensively, nor so as to make it a source of profit to himself, or of injury to his adversary.

Restitution of all advantages the party obtaining the judgment may have acquired by its enforcement, is a consequence of the reversal. The restoration of the parties to the plight and condition in which they were, at and prior to the rendition of the erroneous judgment, it is the spirit and policy of the law to promote and compel.—3 Bac. Ab. Error (m. 3), 389; Freeman on Judgments, § 482. “On the reversal of the judgment,” said the Supreme Court of the United States, “the law raises an obligation on the party to the record, who has received the benefit of the erroneous judgment, to make restitution to the other party for what he has lost. And the mode of proceeding to effect this object must be regulated according to circumstances.”—*Bank of U. S. v. Bank of Washington*, 6 Pet. 17. The party executes the judgment of his own election, at his own peril, and must be presumed to intend assuming the duty and liability of restitution, if the judgment proves erroneous and is subsequently reversed.

The rule seems to be established in all the States where the question has been the subject of judicial decision, with perhaps one or two exceptions, that a party to an erroneous judgment or decree, purchasing at a judicial sale made under it, acquires only a defeasible title, which falls with the subsequent reversal of the judgment or decree.—Freeman on Judgments, § 482; Freeman on Executions, § 347, (the authorities being collected and referred to in the notes); *Galpin v. Page*, 18 Wall. 374; *Jackson v. Caldwell*, 1 Cowen, 644; *Wanebaugh v. Gates*, 4 Seld. (8 N. Y.) 138. In the case of *Reynolds v. Harris*, 14 Cal. 679, discussing the question, BALDWIN, J., said: “It is hard to see why a man buying in another’s property sold under a judgment rendered according to the forms of law, but against the principles of law, should obtain any advantage from his own judgment thus improperly obtained. It is true that as the error was the error of the judge, he should not lose by it; but it is not so clear that he should make a profit by it. It is equally clear, that the defendant should not suffer by any such im-

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proper judgment, if it can be avoided in consistency with a due respect to the rights of others. It would appear to be exact equity to set aside acts which have been illegally done, if this can be without injury to third persons; so that all parties whom the proceedings affect stand in the same position after as before the act so done."

When, however, a stranger to the judgment or decree, the execution of which has not been suspended in the mode prescribed by the statute, becomes a purchaser under it, either prior to, or pending an appeal from it, his title will not be impaired by a subsequent reversal, the court having jurisdiction to render the judgment or decree.—*Wyman v. Campbell*, 6 Port. 219; *Perkins v. Winter*, 7 Ala. 855; *Evans v. Matthews*, 8 Ala. 99; *Hoard v. Hoard*, (opinion of WALKER, C. J.), 41 Ala. 601; Freeman on Judgments, § 484; Freeman on Executions, § 345. The reasons for the distinction in favor of a stranger to the judgment or decree, and against a party to it, seem obvious. In *Jackson v. Caldwell*, *supra*, it was said: "The same reasons of policy which secure to an innocent purchaser a valid title, do not exist when the judgment creditor becomes the purchaser; and it would be the height of injustice to allow the party, guilty of irregularity to take advantage of it." The law permitting the execution of judgments or decrees which have not been superseded, pending an appeal, or before an appeal may have been taken to obtain a reversal, it would be inconsistent with its fixed policy to inspire confidence in judicial sales, to encourage biddings at them, and to secure innocent purchasers in all the advantages fairly derived from them, to suffer any error or irregularity which may have intervened to work injury to them. All purchasers must at their peril inquire into and ascertain the jurisdiction of the court. Scanning the record in search of errors, is not a duty, the law can with safety impose on those who are not parties to the record. If errors exist they are the errors of the court, which they had no agency in producing, and from which no benefit can accrue to them. They have a right to repose with confidence and security, on the judgment or decree, pronounced by a court of competent jurisdiction. If a contrary doctrine prevailed, there would be a want of confidence, uncertainty and insecurity in judicial sales. The sacrifice of property to the greed of speculation, or to the most adventurous bidder, would often be the result. And in a great measure, it would prevent such sales until the lapse of time barred an appeal, and invite a resort to appeals, as the means of obtaining the

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delay of a suspension of execution, without the security which the law exacts as a condition precedent to suspension. The protection of strangers in purchases at judicial sales, when protection will not be afforded the parties, or to those who may be cognizant of irregularities in the process under which they are made, is a very general doctrine in this State. An example is, a purchase of lands under an execution which has been satisfied, or in which the sheriff making the sale may have a latent interest.—*Boren v. McGehee*, 6 Port. 432. The party suing out the process, or the stranger cognizant of its irregularity and abuse, can not in good conscience claim any right or derive any benefit from it. If right or benefit was accorded them, it would be suffering them to take advantage of their own wrong, and extorting a benefit from him whom they had wronged. The stranger is cognizant of, intends no wrong, and is relying on the validity of process, which emanates from proper authority, and is fair and regular on its face. From the irregularity, he derives no benefit, and may suffer loss, if protection in the purchase was withheld from him.

It results from these principles that when a party becomes a purchaser of lands under an erroneous judgment or decree, rendered in his own favor, it is at the peril of having his title defeated by a subsequent reversal. The defeasible quality of his title is engrafted upon it by operation of law, of which ignorance can not be claimed by those who subsequently deal with him. If the words of his title papers expressed the defeasible quality, they would express no more than the law declares. The sound maxim of the common law is, *nemo potest plus juris in alium transferre quam ipse habet*. When the owner of a determinable fee conveys in fee, the determinable quality of the estate follows the transfer.—4 Kent, 10; Broom's Legal Maxims, 303, top p. Practically, the principle which prevails in this State, is, that all conveyances pass the estate of the grantor, and no more—whatever are its incidents operating to defeat, or whatever contingencies, may terminate it, attend it in the hands of the grantee. The legal estate may be subject to equities, which are not allowed to prevail against a *bona fide* purchaser—a purchaser for a valuable consideration, acquiring it without notice. The equity affecting the legal estate, may be older than the equity of the purchaser, but in no other respect, can it be of greater dignity, or more binding in conscience. Equity then following the maxim that when equities are equal, the law must prevail, will not disturb or displace the

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legal estate. But with this exception, and an exception of the protection afforded by statutes of registration, the general principle is, that derivative titles, can not rise above and superior to their original. They do not improve by mere transfer, whether the transfer is the act of the law, or the act of the parties.

We have found but few authorities in which the question presented, has been considered. The first of these is, *Bickerstaff v. Dellinger*, 1 Murph. 272, in which the principle is asserted broadly, that upon the reversal of a judgment, the plaintiff in error is not entitled to restitution from the defendant in error, or from his assignee, of lands sold under an execution issuing on the judgment. The case is distinguishable from the present, in which the decree ordered and was the authority for the sale of the particular lands. The court admit that at common law, if there had been an extent, the plaintiff in error would have been restored to the lands upon which the levy was made, though the judgment creditor had parted with them to a purchaser. The reason of which is, that the title of the creditor depended upon the validity of the judgment, and fails upon a reversal. *All who purchase from him must take this risk, and there is no greater hardship in this than in any other case of failure of title. He may take care to be secured by the covenants in his deed; and, if he distrusts the ability of the grantor, he need not purchase.*—*Bryant v. Fairfield*, 51 Maine, 154; *Delano v. Wilde*, 11 Gray, 17; *Cummings v. Noyer*, 10 Mass. 434; *Little v. Bunce*, 7 N. H. 485; *Goodyere v. Ince*, Cro. Jac. 246. In this last case ALL THE COURT held, there is a difference between a sale and delivery upon an *elegit* to the party himself, and a sale upon a *fiery facias* to a stranger. It seems to us rather a shadowy than a substantial difference, so far as this question is concerned, between the extent of a debtor's lands by a writ of *elegit*, and a sale upon writs of *fiery facias*, now that lands are subjected to sale for the satisfaction of judgments, and such writs are framed so as to confer authority to levy and sell alike goods and chattels, and lands and tenements. When lands were extended by *elegit*, the judgment was of the essence of the title—an indispensable muniment, and so it remains to-day when there is a sale and conveyance upon a writ of *fiery facias*. It must be shown to support an action by the purchaser for the recovery of the lands, or to maintain his possession, if that is assailed by the party to whose title he claims by operation of the judgment to have succeeded. It is upon a distinction between an extent, and a

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sale, the court proceeded, and it seems this distinction would have preserved the title of the party as well as that of his alienee. As to the party, the case is in conflict with the current of authority. The same remarks are applicable to the case of *McAusland v. Pundt*, 1 Neb. 211, in which the same doctrine is held, the court declining to recognize any distinction between a purchase by a party, and a purchase by a stranger. In *Gentian v. Wisely*, 47 Ill. 433, the court protected the title of an *innocent* assignee of a party, purchasing at sheriff's sale under a judgment at law, though recognizing the distinction between a purchase at a judicial sale, by a party, and a purchase by a stranger. In *McCormick v. McClure*, 6 Black. 466; *Taylor v. Boyd*, 3 Ohio, 353; *Ludlow v. Kidd*, ib. 541, the purchases were made by a stranger, from the party purchasing under decrees of sale, before citation in error was served, and his title was protected against a subsequent reversal. If the principle is admitted, and it is admitted in the courts of Illinois and Ohio, and seems to be in the courts of Indiana, that a party purchasing under his own judgment or decree, acquires but a defeasible title, while a stranger will acquire an indefeasible title, it is difficult to understand how there can be an *innocent* purchaser from the party, entitled to protection which would not be extended to the party himself. We mean a purchaser without notice, actual or constructive, of the defeasible quality of the title. There can be no principle touching so nearly men's estates, more firmly established, than that a purchaser has notice of everything appearing clearly on the face of the deeds or instruments which constitute his title, forming an integral part of it. The law conclusively imputes the notice, and neither averment or proof to the contrary, can be heard. His ignorance of all that certainly appears on the face of the title papers, affecting the quality or duration of the estate, can be superinduced only by his negligence, and of that negligence, it would be unwise and unjust to suffer him to take advantage. — *Witter v. Dudley*, 46 Ala. 664; *Johnson v. Thweatt*, 18 Ala. 741, (American note to *Le Neve v. Le Neve*, 4th ed.) 2 Lead. Eq. Cases, 189, top p. The judgment or decree, must be shown necessarily as an indispensable element of the title of the party, on the face of the title papers. And when it is shown, the defeasible quality of the title appears, of which the vendee is bound to take notice. Now, in this case, the deed to Singer, discloses on its face, as the source of the title of his vendors, *the decree of the Chancery Court of Montgomery, in the case of Cowles v. Marks, under*

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which said land was purchased by Laura S. Cowles, as her separate estate. His attention was drawn directly to the decree, and a very casual examination of the record would have disclosed to him the duration and quality of the estate Mrs. Cowles had acquired, and the fact that an appeal was then pending from the decree, which might result in a reversal annulling her title. If he did not make the inquiry,—if he relied on the assertions of the vendors, on the opinions of others, as to the character of the title, he must abide the consequences. The right of a party aggrieved by an erroneous judgment, to a restoration to the condition in which he was, when it was rendered,—the prohibition against the use of such judgment by his adversary, so as to derive advantages he can not restore, would be of little avail, if through the mechanism of an alienation to a party bound to know that the right and prohibition exists, it could be defeated.

The Supreme Court of California, the case of *Reynolds v. Harris*, *supra*, hold that the assignee of the party, stands in the position and succeeds only to the rights of the party. The same principle is asserted in *Twogood v. Franklin*, 27 Iowa, 239, under a statute declaring that the property acquired by a *bona fide* purchaser under a judgment subsequently reversed shall not be affected by such reversal. We can not perceive that a subsequent purchaser from the party, can in right or on any principle of policy, claim the protection which is extended to a stranger purchasing at a judicial sale. The prevention of the sacrifices of property at such sales, the security of titles acquired at them, does not require it. The sale is an accomplished fact, and the sacrifice, as it has been said, is realized or avoided. The party would simply be authorized to transfer a better and higher title than he acquired. Collusive transfers, defeating right and justice, would be stimulated and encouraged. And the conservative principle, intended for the protection of parties aggrieved by erroneous judgments or decrees, from sustaining irreparable loss, would be practically nullified. It is no answer to say, that he may recover of his adversary the proceeds of sale. The adversary may, as in this case, be unable to respond, and he loses his property without fault on his part. The stranger who purchases may say, you ought to have superseded the judgment, and thus prevented the sale, and saved me from parting with money, which may not be reclaimed. The adversary, can say only, by the use of an unjust judgment rendered at my instance against you, *in invitum*, I have obtained an advantage, which I will secure by a sale to

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another, and the other though he derives it from me, will obtain a better title than I had. We can not declare this to be the law of the land.

There is another point of view, in which the claim of Singer to protection must fail. The allegation on which his right to protection is rested—its very foundation and corner stone, is, that he is a *bona fide* purchaser, for a valuable consideration, without notice. His answer averring these facts is not responsive to the bill—the matter is rather in confession and avoidance of that which is averred by the complainant. It is scarcely necessary to say, the burden of proof was upon him to establish the allegation.—2 Lead. Eq. Cases, 101. No proof in support of it was given; and though the cause was heard on bill and answer without testimony, the complainant having waived a verified answer, the answer is mere pleading, even so far as it is responsive.—Code of 1876, § 3786.

The result is the decree of the chancellor must be reversed, and the proper decree will be here rendered. It is therefore ordered, adjudged and decreed that the sale of the lands to the appellee, Laura S. Cowles, made by the register under the decree in this cause, which was reversed in this court, at the December term, 1875, be and the same is hereby vacated and annulled, and the said Laura S. Cowles, and her husband, Thomas W. Cowles, are required within ten days after service of notice of this decree, and a demand therefor, to surrender to the register of the Court of Chancery, the conveyance made to her on the aforesaid sale by said register, and the register will cancel the same, and file it with the papers in this cause.

It is further ordered, adjudged and decreed that the complainant be let into possession of the lands described in the original bill, and for this purpose, if the parties in possession refuse to surrender the same, the register will on the application of the complainant issue a writ of possession against such parties, directed to any sheriff of the State of Alabama, commanding him to place the complainant in possession.

It is further ordered, adjudged and decreed, that the next friend of the appellee, Laura S. Cowles, pay the costs of the cross-bill to be taxed by the register, and that the appellee, Thomas W. Cowles, pay the costs of the original bill, and the appellee, J. E. Singer, will pay the costs of the supplemental bill, and the costs of this appeal.

[Brewer, Auditor, v. Watson.]

Brewer, Auditor, v. Watson.*Application for Mandamus.*

1. *Inspection of public record of executive department; when denied.*—Where the party has no interest, or the disclosure sought would be detrimental to the public interests, inspection of the records of an executive department of the government may be denied.

2. *Same; when can not be denied.*—Public interests are not endangered, by allowing a tax-collector, or his attorney, to inspect the collector's account with the State, as kept in books in the Auditor's office; and if such inspection is requested, and the Auditor denies it, *mandamus* lies against him.

APPEAL from Montgomery City Court.

Tried before Hon. JOHN A. MINNIS.

The facts are contained in the opinion.

JOHN W. A. SANFORD, for appellant. .

GEO. F. MOORE, *contra*.

MANNING, J.—In his petition, appellee alleged that he was an attorney-at-law and proctor, licensed to practice as such in the courts of this State, and a citizen thereof; that one “J. F. Boyles was, during the year 1875, duly and legally acting as tax-collector of the county of Monroe,” and as such had an account with the State, which was and is kept in a public record and book of the Auditor's office, “known as the Tax Ledger, which contains the accounts of the tax-collectors of the State with the State of Alabama;” that Boyles employed petitioner as an attorney-at-law to collect a balance claimed to be due to him as tax-collector; and that petitioner had demanded in writing of the Auditor of the State (Mr. Brewer) the right to inspect as attorney for Boyles the said account with him on the tax ledger; which was denied and refused to him by the Auditor: wherefore a writ of *mandamus* was prayed.

The City Court granted the writ in the alternative—that the Auditor permit the inspection of the account, or show cause why he should not, on a day specified in the writ. On that day the Auditor appeared and demurred, alleging that no right was shown by petitioner to the writ; and the de-

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murrer being overruled the Auditor declined to plead further and appealed to this court.

An inspection of the records of judicial proceedings kept in the courts of the country, is held to be the right of any citizen.—1 Greenl. on Ev. (8 ed.) § 471. But it seems that books kept in the public offices of the executive department are not—at least all of them—equally open to examination. It is said that “access to them will not be granted to persons who have no interest in the books.” What the nature or extent of the interest must be, need not now be considered. “Such inspections are also sometimes refused on grounds of public policy, the disclosure sought being thought detrimental to the public interest.”—Id. §§ 475, 250.

Neither of these reasons though, could be alleged in opposition to the application made in this instance. The petitioner disclosed an interest as attorney for a late tax-collector, which gave him a right, by the common law, to inspect the accounts of his client with the State, in the Auditor's office; and no legitimate interest of the State could be endangered by permitting him to do so. The account was a thing of common concern to the State and its ex-official, and it must be presumed that both were equally desirous that it should be correct. Boyles might, besides, properly seek to know how his accounts stood, with a view to using them in support of a claim against some other person.

The common law right of one whom they concern, to be informed of matters of that sort, is emphasized by a statute prescribing the duties of the Auditor, which requires him to “certify under his official seal, . . . on application and payment of the legal fees therefor, for private or personal use, copies of any paper required to be kept in his office.” Code of 1876, § 85, cl. 21. This implies that there is a right first to see the paper; for how could it otherwise be known whether or not it would be of any use?

This statute seems to have been enacted rather for the particular purpose of enabling citizens who might need them to obtain duly authenticated available copies of papers on file in the Auditor's office, than any thing else. And we presume that if the information that might thereby be communicated, would injuriously affect any important public interest, such, for instance, as might be involved in a grave pending negotiation, the Auditor might lawfully decline either to grant copies or allow an inspection of the originals. However, that is a question not before us, and which need not now be decided.

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Petitioner is without any other adequate remedy for the enforcement of his right to inspect his client's account, and therefore properly prayed the aid of a writ of *mandamus*.

There was no error in the judgment of the City Court overruling the demurrer, and it is affirmed.

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Action on Bill of Exchange.

1. *Error, when not ground for reversal.*—If upon the evidence admitted, and that rejected, excluding that to which a party objected, the court could properly have instructed the jury to find against him, and the jury does so find, he can not complain of erroneous rulings on the trial; for all presumption of injury is repelled, and error without injury is not ground for reversal.

2. *Note; when maker can not dispute, or inquire into consideration of.* Where the debtor, at the request of the creditor, makes a note payable to a third person, who sues the maker, the latter can not, in that suit, inquire into or dispute the consideration, moving between the creditor and the payee of the note, or show that it had failed.

3. *Contracts; what illegal.*—All contracts encouraging prostitution, or auxiliary to the keeping of a bawdy house, are void, and the aid of the courts can not be invoked to enforce or rescind them; the principle, however, is confined to the illegal act, or to the original contract, and is not extended to subsequent, new and independent transactions, founded on a new consideration, not a part of the original scheme, though between the same parties and having relation to the same property.

4. *Illegal contract, right of parties to rescind.*—Parties to a void and illegal contract may rescind it, and place themselves in *statu quo*, no other consideration being necessary than their mutual agreement; and when it is agreed that money paid under the rescinded contract should be restored, an action to recover it back can be maintained, upon the agreement of rescission, which is a new and independent agreement, founded on a new consideration, removed from and not a part of the original transaction, and unaffected by its illegality.

APPEAL from Circuit Court of Dallas.

Tried before Hon. GEO. H. CRAIG.

The appellee, Cassen, commenced suit before a justice of the peace, against Etta Mills, to recover the amount of a bill of exchange drawn on, endorsed, and accepted by said Etta Mills, and payable to the plaintiff. Etta Mills having died pending the appeal to the Circuit Court, appellant Lea, who became her administrator, was made a party in her stead.

The material facts of the case may be thus stated: In February, 1873, Etta Mills, alias Eugenie Estes, appellant's intestate, and Jennie Walters were common and notorious pros-

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titutes in the city of Selma. Etta Mills sold and conveyed a house and lot, together with the furniture therein, and which said Etta was then using to carry on a bawdy house, to said Jennie Walters, knowing at the time that the latter intended to carry on the "same business." Jennie Walters made a cash payment, and executed a mortgage back to Etta Mills to secure the deferred payment. After this, said Walters continued to use the premises and furniture in keeping a bawdy house. After this, disagreements sprung up between them, and Etta Mills filed her bill in chancery against Jennie Walters, and also brought an action of detinue against her in the Circuit Court. The bill of exceptions does not state the nature of these suits, but is a fair inference from its recitals that the bill was filed to foreclose the mortgage, and the detinue suit was brought to recover the personalty. Bonds had been given and costs incurred in the prosecution of these suits. In December, 1873, the parties agreed to compromise and adjust their differences, rescind their contract, put themselves in *statu quo*, and release each other from all damages or liabilities growing out of the suit, and that the money paid on the purchase should be refunded, less the value of the rent, and the property restored to Etta Mills. Part of the money so to be refunded was to be paid to certain creditors of Jennie Walters. This agreement was reduced to writing, and complied with, and in pursuance thereof the appellant's intestate executed the note sued on to Cassen who was a creditor of said Jennie Walters. There was nothing on the face of this agreement which showed the past use to which the property had been put, or any intention to use it in the future for any illegal purpose, or that the parties thereto were prostitutes. Cassen was not present when this agreement was signed and the notes executed, but his attorney was. At the time of signing the agreement, Etta Mills remarked that she intended to fit the property up nicely when she got it back, and would "keep a number of pretty girls in it." A witness who was present testified, that on the negotiations before and at the time of signing the agreement, neither of the parties said any thing about reforming.

The appellant sought to assail the consideration passing between Cassen and Walters for the indebtedness of the latter to him, and offered proof that the debt was for liquors furnished her, and used in connection with her bawdy house.

The appellant reserved various exceptions to rulings upon evidence, and as to charges given and refused, which are not material in the view the court took of this case.

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WHITE & WHITE, for appellant.—The consideration of the bill of exchange sued on, was tainted with the illegality of the transactions between Mills and Walters; and it could only become valid as between Cassen and Mills, by proof of a good and lawful consideration.—See 25 Ala. Rep. 484; 15 Ala. 625.

BROOKS & ROY, *contra*.—1. If an illegal contract be executed or performed, and both parties are in *pari delicto*, no action lies to recover back money paid under it; but if the contract be executory, and the plaintiff dissent from or disavow it before its completion, or the parties mutually rescind it, money paid on it can be recovered under a count for money had and received.—Chitty on Con. (7 ed.) 637, and Eng. and Amer. authorities cited; *White v. Franklin Bank*, 22 Pick. 189. That upon rescission of any contract, either party may recover any money paid out under it, see, also, authorities. 1 Brick. Dig. 141, § 76; *ib.* 144, §§ 129, 131. Here the contract was executory and uncompleted; it was rescinded by mutual consent; and there was an express promise to refund the money paid under it. Moreover, there was a further consideration, viz: the compromise of two suits, and the release of damages on the bonds given in those suits. Walters being thus entitled to the money, the promise of Mills to pay it to the creditors of Walters, at her request, was on a new, valuable, and lawful consideration.

2. Contracts growing remotely out of an illegal contract, or contributing indirectly only to the illegal purpose, or founded on a new consideration, are valid and will be enforced; though all parties knew of the original illegal contract or purchase.—41 Ala. 436, *et seq.*, and authorities cited; 25 Ala. 483; 1 Littell, (Ky.) 50; 1 Monroe, (Ky.) 113; 2 J. J. Marshall, (Ky.) 222; 3 Ala. 474, referring to the above Kentucky cases.

BRICKELL, C. J.—The bill of exceptions purports to set out all the evidence which was given to the jury, as well as that which was offered by the appellant and rejected, and that which was admitted against his objection. If on the evidence admitted, and that which was rejected, excluding that which was objected to, the Circuit Court could have properly instructed the jury, that the appellant had established no just defense to the plaintiff's action, it is unnecessary to decide whether its several rulings to which exceptions were reserved, were erroneous or not; for if erroneous, they

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have not injured the appellant, and it would be idle to reverse the judgment, for errors of no practical importance. Error and injury, must combine to authorize the reversal of a judgment. Generally, injury will be presumed from error—and the presumption must prevail, unless it is clearly and affirmatively repelled. But when the uncontroverted evidence negatives or fails to establish a right of recovery in the plaintiff; or establishing that right, negatives the defense preferred, the presumption of injury to the one, or the other party, as he may be appellant, is repelled, and the judgment accomplishing the right result, will not be disturbed.—1 Brick. Dig. 780, §§ 96–99.

Whether there was any, or what was the consideration, moving between the appellee and Walters, which induced the latter, to request and cause the bills of exchange to be made payable to the former, is not material. The appellant is not entitled to inquire into, or dispute that consideration. The bills of exchange import that the intestate owed the money expressed in them, and it is unimportant to her, whether her creditor gave it away, appropriated it to the discharge of illegal contracts into which she had entered, or to the payment of her just debts. Authority for payment to the appellee was given, which if revocable, there has been no attempt to revoke, and from the duty of payment, the intestate can not be absolved, by assailing the consideration of the transaction between her creditor and the appellee. The principle is thus stated by Parsons: "If a note be given for a consideration passing between one of the parties to the note and a third person, and the payee sue the maker, it seems to be held immaterial in that action whether this consideration, as affecting the third party has failed or not." 1 Pars. Notes and Bills, 200; *Railroad v. Chamberlain*, 44 N. H. 494; *Horn v. Fuller*, 6 N. H. 512.

The single question the case presents, is, whether the contract between the intestate and Walters, was so tainted with illegality, that as between them it can not be enforced. All contracts, for the doing of that, which the law forbids, or of that which is *contra bonos mores*, or violative of public policy, are void, and the law will not generally interfere to enforce or rescind them. It leaves the parties severely alone, to abide the consequences of their illegal and immoral conduct. Falling within the contracts, condemned by law, are all "encouraging prostitution, or auxiliary to the keeping of a bawdy house,"—or, in the language of POLLOCK, C. B., "supplying a thing with the knowledge that it is going to

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be used for that purpose.”—Bish. Con. § 496; 2 Chit. Con. 980. The principle is however confined in its operation to the illegal act, or to the original illegal contract, and is not extended to subsequent, new and independent transactions, founded on a new consideration, not a part of the original scheme, though between the same parties, and having relation to the same property.—Story’s Con. Laws, §§ 248–9; *Scheible v. Bacho*, 41 Ala. 423; *Armstrong v. Toler*, 11 Wheat. 258; *McBlair v. Gibbs*, 17 How. 232; *Brooks v. Martin*, 2 Wall. 70. The same reasons and policy on which the law proceeds in denouncing contracts made in violation of law, common or statute, or which offend public morals, or public policy, will encourage parties to a rescission of such contracts, and the restoration of themselves, to the condition in which they were, before they entered into them. The competency of parties to rescind, is as broad as their capacity to make contracts—they may, if they choose, undo what they have done. Generally, no other consideration is necessary to support the rescission of a contract, than the mutual agreement of the parties—no other consideration may intervene. And if there is a rescission, money having been paid by the one party to the other, the law implies, (if there is no express promise), a promise on the part of party who had received, to refund it. When contracts are rescinded, it is a just and a legal presumption, if there is no contrary stipulation, that the parties intend each shall be placed *in statu quo*, or restored to the condition in which he was, when the contract was made.—*Pharr v. Bachelor*, 3 Ala. 237; *White v. Wood*, 15 Ala. 358.

It may be admitted the original contracts between the intestate of the appellant and Walters were void, because of the knowledge of the intestate, of the evil intent and purpose moving Walters to the purchase of the property, and of the immoral use to which she intended devoting it. Nevertheless these contracts the parties could rescind, and if rescinded voluntarily, the rescission is a new and independent agreement, founded on a new consideration, *the mutual agreement of the parties*, and it is removed from, not a part of the *original scheme*, unaffected by its illegality, and the courts will enforce it. It is often said that the test whether a contract or demand connected with an illegal transaction is capable of being enforced, is, whether the plaintiff requires any aid from the illegal transaction to establish his case. It is probably true, as is said by the Supreme Court of the United States, this test is too narrow in its terms and ex-

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cludes many cases where the plaintiff could establish his case independently of the illegal transaction, and yet his demand would be infected with the illegality. But to this case the test may be applied, or a broader test may be adopted, and the contract of rescission, is a new, independent contract, lawful in itself, founded on a new consideration, and unaffected by the illegality of the contract rescinded. Otherwise, parties who enter into an illegal contract, would be irrevocably and immutably committed to it, though of it they may repent, and though all the purposes of the law and of its policy would be advanced by a rescission. Not only the mutual agreement of the parties, but a new and substantive consideration of value, disconnected from the illegality of the original contract, intervened to support the rescission. The quieting of pending litigation, and the release of the intestate from all liability on the bonds given by her in its course, was of itself a new and sufficient consideration for the rescission; and it was certainly far removed from, and disconnected with the illegality of the original transaction.

It is insisted however that Walters at the time of the rescission knew that the purpose of the intestate in agreeing to rescind, was to obtain possession of the property and appropriate it to the keeping of a house of prostitution, and the agreement of rescission is as illegal, as was the contract rescinded, and consequently no action can be maintained on any promise express or implied of the intestate, which forms part of, or grows out of the agreement of rescission. The answer is, there was no evidence indicating the purpose of the intestate in agreeing to the rescission, was to obtain possession of the property for such purposes. It may have been inferrible from her past conduct, and from the use she had formerly made of the property, that she would devote it to the same uses. But the evidence justifies no other legal inference, than that the moving consideration with the intestate in the rescission, was restoration to the title and possession of property, she had lost by illegal contract, and a release from liability for any breach of the bonds given by her in the course of the suits she had instituted for its recovery. Money lent to a gambler expressly for the purposes of gaming, is not recoverable. But the gambler can not prove his bad character, to raise an inference of guilty knowledge against all who may lend him money—that he borrowed for the purpose of gaming, and consequently they aided him in the gaming at which he risked the money borrowed. The knowledge on the part of the lender which will strip him of

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a right to recover, must be, that the money borrowed is for the purpose of gaming, and with that intention on the part of the borrower. If he had no such knowledge, it can not be justly said he enters voluntarily into a contract which contributes to a violation of law.—1 Parsons Notes and Bills, 200. The mere declarations of the intestate as to the uses to which she would appropriate the property when she got it back, were not inconsistent with, or indicative of a purpose different from that so clearly expressed in the writing, the rescission of the former contract, and the restoration of the parties to the condition in which they were, when that contract was made. This purpose was legal and innocent, and knowledge of another, if it existed, must have been brought home to Walters, by clearer and more direct evidence than is shown by the bill of exceptions, before complicity in it could be imputed to her.

We are of the opinion after this examination of the case as it is shown by the bill of exceptions, the Circuit Court could well have instructed the jury to find for the plaintiff, and the appellant could not therefore have been wronged by any of the rulings to which exceptions were reserved.

Affirmed.

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Application for Mandamus.

1. *Auditor; power of, to re-state accounts settled by his predecessor.* The Auditor in settling a public official's account for one year, has no authority to re-state an account settled and certified by his predecessor in a former year, embracing in the last account items which should have been included in the former, and then by certifying such re-stated account, make it presumptive or *prima facie* evidence of its correctness; as to the items thus brought forward, the Auditor's certificate furnishes no evidence of their correctness.

2. *Same.*—The failure of the Auditor, in settling with a public official, to include items with which he was justly chargeable, will not debar the State from an appropriate action against the officer; but the error must be shown, as in other cases of mistakes in accounting; it can not be proved or shown *prima facie*, by a re-statement by a succeeding Auditor.

3. *Mandamus; when will not lie to correct re-statement.*—Where it is not averred that the Auditor has certified, or will attempt to certify, as correct, items brought forward from the settlement had in a former fiscal year with his predecessor, or that suit has been brought or threatened to be brought,

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such alteration of the account works no harm to the officer; and having an ample remedy in defense of suit, if brought, he is not entitled to *mandamus* to compel the Auditor to strike out such disputed items.

APPEAL from City Court of Montgomery.

Tried before Hon. JOHN A. MINNIS.

Appellant was tax-collector of Chambers county for the fiscal year 1875, ending September 30th, 1876, and his accounts for that year were audited, examined, and passed by R. T. Smith, the then Auditor. On this settlement it was ascertained that nothing was due the State. Willis Brewer succeeded Smith as Auditor, and in stating Weaver's account for the next fiscal year, reexamined the account for the fiscal year 1875, and determining that three certain items of debit against Weaver had been omitted in the account of 1875, he embraced them in the account of the next year, whereby that account was increased by the sum of \$1,629.43. Weaver avers that he made a full, fair and just accounting with Smith, and that he owes the State nothing on the settlement for the fiscal year 1875, and that Brewer's action was unwarranted and injurious. He, therefore, prayed for *mandamus* to compel Brewer to strike out of the account, stated for the fiscal year ending September 30th, 1876, three items mentioned.

Brewer moved to quash the writ and dismiss the proceedings, on the following grounds: *First*, "because the court has no jurisdiction of the subject-matter of the petition; *second*, because it is not shown that petitioner has a clear, specific, legal right to be enforced by *mandamus*; *third*, the averments of the petition show no right to relief."

The court granted the motion and dismissed the petition, to which ruling petitioner excepted. This ruling is now assigned as error.

GEORGE F. MOORE, and C. J. WATSON, for appellant. Whether Smith acted as an executive officer, or exercised judicial power in settling Weaver's account, the power to re-examine and re-open it, so as to furnish a basis for summary proceedings for its collection, was exhausted after once being exercised; and neither Smith nor his successor, had further power over the matter.—15 Peters, 389; 7 Peters, 1; 6 Bingham, 85; *Ex parte Randolph*, 2 Brokenboroughs, 473; *Hobson v. Commonwealth*, 1 Duval, 176; *Arthur v. Adams*, 49 Miss. 400; *Ross v. Lane*, 3 S. & M. 665; 61 Pa. State, 290. In *Supervisors v. Briggs*, 2 Denio, BRONSON, J., said it is a "monstrous proposition," that one accounting officer

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can unsettle everything which his predecessor had settled. There would be no security for officials, and no end to litigation, if an over-zealous Auditor had power to re-open and re-state the accounts settled by his predecessors for years past.

2. Appellant has no other adequate and specific remedy than *mandamus*. A re-statement of an account, which if allowed to stand, makes a public officer who has fully accounted, a defaulter, is a grievous wrong. Is there no power to correct it, before suit is brought on it? It may be that the petitioner could defeat the suit when brought on the re-stated account, on the ground that there was no power to re-state it. The right of defense is not an adequate remedy. The official bond of appellant gives a lien on his property and that of his sureties. He can not sell his property with this lien resting on it.—*Commissioner's Court v. Moore*, 53 Ala. 25; 43 Ala. 321; *Lawrence v. Supervisors*, 18 Hun, 308; 6 Texas, 457; *Ex parte Trapnall*, 1 English, 9; 6 Ohio State, 325; High, Extraordinary Legal Remedies, § 17; 9 Heiskell, 699.

JOHN W. A. SANFORD, *contra*.—1. The writ of *mandamus* will be granted only when there is a specific legal right, and no other specific legal remedy.—2 Brick. Dig. 240, § 4.

The Auditor is an officer whose duties relative to the public revenue are prescribed by the Code.—§ 85 *et seq.* Although an executive officer, his duties require much care and discretion. How tax-collectors shall be charged, or how they shall settle their accounts, is not a matter of caprice; nor is it a mere mechanical operation. As this is recognized, the courts will not interfere to control his discretion.—*Bell v. People*, 4 California; 2 Otto, 541.

STONE, J.—J. G. Weaver, tax-collector of Chambers county, settled and closed his account as tax-collector, for the fiscal year 1875, with Robert T. Smith, former Auditor, and received his discharge. Smith went out of office, and Willis Brewer, present Auditor, succeeded him. In making up the account of said tax-collector for the fiscal year 1876, Brewer reexamined the account for 1875, came to the conclusion that certain items of debit, properly chargeable to Weaver, had been omitted from the account of 1875, and he thereupon embraced those items of charge in the account of the tax-collector for the fiscal year 1876—thus increasing the latter account by the sum of \$1629.43. Such are the aver-

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ments of the petition or relation in this case. The present record raises the question, had the succeeding Auditor authority to re-state and correct the account and settlement made by his predecessor? "It is the duty of the Auditor . . . to audit and adjust the accounts of all public officers, keeping a regular account with every person in each county in the State who is by law authorized to collect and receive any part of the State revenue, in suitable books, in which he must charge such persons with all sums of money due from them severally, and credit each with all moneys paid by him to the Treasurer, having first certified to that officer the amount or balance due."—Code of 1876, § 85, subd. 6. The tax-collector is a public officer, and the plain import of the language copied above is, that on the Auditor is cast the duty of stating and certifying the accounts, by which such collecting officer is, *prima facie*, required to settle; because the account, so stated and certified, is *prima facie* correct. . . . "Transcripts from the books and proceedings required to be kept by any sworn officer of the State, are presumptive evidence in any civil cause, and have the same effect as if the original were produced and proved, upon the certificate of the custodian thereof that it is a true copy of the original."—Code of 1876, § 3047. Taken in the connection in which the word *presumptive* is used above, we think it is the equivalent of *prima facie*. Such certified transcript from the books of a sworn officer of the State establishes its correctness, until overcome by countervailing testimony. The Auditor is a sworn officer of the State, and transcripts from books which the law requires him to keep, certified by him, fall within the statute.—*Timberlake v. Brewer*, 59 Ala. 108.

The office of Auditor, though filled by successive incumbents, is a continuous thing. Each of the several incumbents has the same powers, and only the same powers. Neither is clothed with revisory powers over the other. When an Auditor states and certifies an account against a tax-collector, it becomes, *prima facie*, a correct account. A re-statement by a subsequent Auditor can only be *prima facie* correct. Which *prima facie*, or presumptive proof shall overcome the other? The law has not declared that the later stated account shall prevail over the former. The law has said nothing on the subject. Is it implied in the nature of the duty? Many reasons, in addition to those stated above, combine to force us to the conclusion that the Auditor had no power to correct errors he may detect in the accounts stated, certified

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and collected by any of his predecessors, and thus make such re-stated account a *prima facie* charge against the officer. We state but one, which we consider conclusive. If the Auditor can re-state one account, he can overhaul any number; and, as the statute of limitations against the State is twenty years, he can extend his investigations back that number of years. Such a rule would be so harrassing, that we can not believe the legislature intended to establish it.

What we have said has been drawn from our own construction of the statutes, and the nature of the duty cast upon the Auditor. Our conclusions are supported by ample authority. In *Ex parte Randolph*, 2 Brock, 447, Randolph was a lieutenant in the navy of the United States, and had officiated as acting purser of a national ship on the Mediterranean. On his return to the United States, he had settled his account at the proper department in 1828. In 1833 the then Fourth Auditor opened and re-stated his account, on the ground that it had been erroneously stated and settled in the first instance, and the account as re-stated exhibited a large balance due from Randolph to the United States. To enforce the collection of this certified balance, Auditor's warrant was issued—process which was authorized by law—and Randolph was arrested thereunder. He applied for enlargement on *habeas corpus*. The court ruled that the account of the petitioner, having been once stated and settled at the treasury department, the law invests the Auditor with no power to open and re-settle it. Randolph was discharged from custody. The court ruled, however, that their construction only relieved Randolph from amenability to the summary, statutory process of distress, and did not prevent a recovery against him in proper legal proceedings, if he had not, in fact, duly accounted for the money which had come to his hands. In the case of *U. S. v. Bank of Metropolis*, the claim against the bank was for deposits made therein by the Postmaster-General. The bank asserted certain claims against the postoffice department, which were audited and allowed, and the claim against the bank was thus neutralized and set off. After the then Postmaster-General went out of office, his successor re-stated the account, disallowing the bank's credits which had been allowed by his predecessor, and thus showed a large balance against the bank. Upon this balance suit was brought, and the question arose on the authority of the succeeding Postmaster-General to reexamine and re-state the account against the bank. In the opinion of the court is the following language: "The third

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instruction asked the court to say, among other things, if the credits given by Mr. Barry, were for extra allowances which the said Postmaster-General was not legally authorized to allow, then it was the duty of the present Postmaster-General to disallow such items of credit. The successor of Mr. Barry had the same power, and no more, than his predecessor, and the power of the former did not extend to the recall of credits or allowances made by Mr. Barry, if he acted within the scope of official authority given by law to the head of the department. This right in an incumbent of reviewing a predecessor's decisions, extends to mistakes in matters of fact arising from errors in calculation, and to cases of rejected claims, in which material testimony is afterwards discovered and produced. But if a credit has been given, or an allowance made, as these were, by the head of a department, and it is alleged to be an illegal allowance, the judicial tribunals of the country must be resorted to, to construe the law under which the allowance was made, and to settle the rights between the United States and the party to whom the credit was given. It is no longer a case between the correctness of one officer's judgment and that of his successor. . . . No statute is necessary to authorize the United States to sue in such a case. The right to sue is independent of statute, and it may be done by the direction of the incumbent of the department."—15 Pet. 377.

In the case of *Board of Supervisors v. Ellis*, 50 N. Y. 620, a question arose as to the power of a succeeding board to review and re-adjudge the action of their predecessors. The court said, "Doubtless, if a board of supervisors at one time acts finally upon a matter of which they have jurisdiction, and as to which they have lawful right to act, a succeeding board may not undo what they have done, to the immediate detriment of third parties."—See, also, *Board of Supervisors v. Briggs*, 2 Denio, 26.

In the case of *Hobson v. Com.*, 1 Duvall, 172, an attempt was made by a succeeding Auditor to correct an alleged mistake of his predecessor, in settling with the sheriff, who was tax-collector, for revenue collected by him. Speaking of the acts of the Auditor, as affecting the State, the court said: "He was her accredited organ, with full power and discretion to settle, and record as settled accounts of sheriffs for revenue due to her. . . . His adjustment once closed and registered by him, was made conclusive, unless changed by a direct judicial proceeding for the purpose of correcting any error or mistake committed by him. . . .

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The Auditor himself was *functus officio*, and could not change the registered account by his own act. . . . And, of course, his successor could make no correction, and especially after two years, within which period even a suit for correction is expressly limited by law."—See, also, *County of Yallabusha v. Carboy*, 3 Sm. & Mar. 529; *Arthur v. Adam & Speed*, 49 Miss. 404; *U. S. v. Jones*, 8 Pet. 375; *Porter v. School Directors*, 18 Penn. St. 144; *Township of Middleton v. Miles*, 61 Penn. State, 290; *Burnett v. Auditor*, 12 Ohio, 54; *Kendall v. U. S.* 12 Pet. 524; *Treasurer of Mobile v. Huggins*, 8 Ala. 440. We hold that the Auditor had no authority to re-state the tax-collector's account, charging him with items which his predecessor should have embraced in the settled account of a previous year, and by certifying such re-stated account, make it presumptive, or *prima facie* evidence of its correctness. We do not decide that if Weaver, the tax-collector, failed to account for and pay moneys of the fiscal year of 1875, belonging to the State, with which he should have been charged, he may not be made to account for such moneys in an action at law. All we decide is, that, as to the items belonging to the fiscal year 1875, and brought into the corrected account of the fiscal year 1876, the Auditor's certificate or transcript certified, furnishes no evidence that they are justly due and owing. Such charges must be supported by other evidence; and the State, in such suit, will stand in the relation of any other suitor who claims that in making a settlement, he had, by mistake, demanded and received less than was due him. The Auditor's certified statement of account, lawfully made, is presumptive or *prima facie* evidence of its correctness. It is nothing more; and this presumption or intendment may be invoked by the officer sought to be charged, equally with the State. The presumption may be overturned by proof, whether offered by the officer whose accounts are in controversy or by the State seeking to show a larger indebtedness.

The result of what we have said is, that, according to the averments of the petition in the present case, the account against Weaver, stated and certified in the Auditor's office, is larger by the sum of \$1,629.43 than the Auditor was authorized to raise, by his certificate to the dignity of "presumptive evidence." Is this a case for *mandamus*? We have shown that Weaver has a specific legal right. Is there no remedy, other than *mandamus*, adequate to the enforcement of that right?—2 Brick. Dig. 240, § 4. If suit were

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brought against Weaver, the Auditor's certified transcript of his account would not be presumptive evidence against him, so far as it certified items of a former year, alleged to have been omitted in some former settlement. As to such items, the State would be required to produce proof, other than the certificate of the Auditor. This is the whole question; a mere contest as to the burden of proving. The issue, whether or not the tax-collector owes the disputed items, can be made, contested and adjudicated, as well under the one construction as the other. In such suit, and on such issue, the Auditor's account, stated and certified, makes a *prima facie* case for the State, as to all items which pertain to the account proper of the particular year, or transaction he was required to audit and adjust. If any part or item of such stated account be disputed by the tax-collector, the burden is on him of disproving such *prima facie* case. On the other hand, if it be contended for the State that errors and omissions of debit occurred in an account and settlement previously stated and made, then such certified and settled account furnishes to the tax-collector *prima facie* evidence of its correctness, and casts on the State the burden of proving the errors and omissions complained of, by evidence other than the Auditor's certificate.

The bond of the tax-collector operates "from its execution as a lien in favor of the State and county on the property of such tax-collector for the amount of any judgment which may be rendered against him in his official capacity for the State or county taxes, and on the property of his sureties, from the date of his default."—Code of 1876, § 403. It is contended for petitioner that this lien constitutes such an incumbrance or cloud on the title of the property of both principal and sureties on the collector's bond, as to impair, if not to destroy its vendibility; and that on this account, *mandamus* is the only adequate remedy to remove the cloud, and relieve the property from the incumbrance. It will be seen, in what is said above, that the Auditor's statement of the items brought forward from a former year does not prove its correctness, or raise the presumption of its correctness. If he were to certify such re-stated account as correct, his certificate as to the items brought forward would have no effect whatever. It would prove nothing. But the Auditor can certify the itemized account made by his predecessor; and if such stated, itemized, settled account show on its face errors of calculation, or other patent errors, we are not prepared to say such certified past-stated accounts would not

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furnish evidence for its own correction, in any suit that might be brought on such alleged default. But this question is not before us. The petition does not aver that any suit against Weaver is either brought, or threatened to be brought—does not charge that the Auditor has certified, or will attempt to certify as correct, the items brought forward from the prior fiscal year. These disputed items can do Weaver no harm, for they are not clothed with the sanction of official authentication. We think the relator has an ample remedy in his right to make defense to any suit that may be brought against him, and that he shows no right to the extraordinary remedy of *mandamus*.

Judgment of the City Court affirmed, and *mandamus* denied.

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Bill in Equity to enjoin Action of Ejectment.

1. *Allegation of necessity for sale; what sufficient on collateral attack.* On collateral attack, a petition for sale of decedent's lands for division, &c., which describes the locality and situation of the lands, and avers that they would be unproductive, unless divided into lots and buildings erected thereon, which the estate has no means of paying for, "*wherefore it is manifest, said lands can not be equitably divided between the heirs of said estate, unless by a sale of the same,*" &c., is sufficient, in its allegations of the necessity for a sale, to give the court jurisdiction to order the sale.

2. *Necessity for sale, ascertainment of; what sufficient on collateral assault.*—An order of sale of lands descended to infants, reciting that "*K., commissioner heretofore appointed to take testimony in this cause, having reported the same, which by order of the court is approved and ordered to be filed among the papers of said estate; and the court proceeded to examine the testimony, and from said testimony it appears to the court that said lands can not be equitably divided among the heirs-at-law, without a sale thereof, and also that it would be more to the interest of the minors to sell said property and reinvest,*" &c., contains enough to show that the necessity for sale was ascertained by proof of disinterested witnesses, taken by deposition as in chancery cases, when the order of sale is attacked collaterally.

3. *Heir; when will be enjoined from prosecuting ejectment.*—Lands descended to infants were sold under order of the probate court, for division. The sale was confirmed, the purchase-money paid, and a conveyance ordered to the purchaser, but the administrator failed to execute it. The record showed enough to sustain the sale on collateral attack. The administrator made final settlement, accounting for the proceeds of the sale, and the heirs' respective shares thereof were paid to their guardian, who disbursed it for their support. No fraud or unfairness was charged,—*held*: The purchaser

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acquires a good equitable title to the land; and a court of equity at his instance, or one claiming under him, will enjoin ejectment by the heirs, after attaining majority, to recover the land.

APPEAL from the Chancery Court of Montgomery.

Heard before Hon. H. AUSTILL.

The appellee, the Bishop Cobbs Orphan Home, a domestic corporation, filed this bill against the heirs-at-law of Mary Terry, deceased, to enjoin the prosecution of an action of ejectment which the latter had brought in the year 1873, against appellee, to recover certain lands which had formerly belonged to said Mary Terry, deceased.

The material facts of the case are as follows: Mary Terry died in the year 1856. Her heirs-at-law were two grandchildren, then under ten years of age. Algernon S. Bibb was appointed and qualified as administrator. On the 6th day of September, 1856, Bibb filed his petition in writing, under oath, which, after stating that deceased died seized and possessed of certain lands, of which the premises in controversy formed a part, &c., proceeds as follows: "That the value of said lands arises mainly from its proximity to the city of Montgomery, and its suitableness for building lots for persons resident in the city of Montgomery; that there is but one residence erected on the land, and that the dwelling and outbuildings are greatly in want of repairs, and that it will require a large expenditure of money, in proportion to their value, to make them rent for a fair remuneration on their cost. Further showing, states that the rent of said premises and all the income of the heirs of said estate from other sources, would not afford the means during their minority to build upon, and so improve the said lands, as to make them yield a fair *per centum* upon the value of said premises. Further shows, that from the facts herein set forth, it is manifest that the said lands can not be equitably divided between the heirs of said estate, unless by a sale of the same."

The petition then states the names and ages of the heirs, and concludes, "wherefore, your petitioner prays the order of this court, directing and commanding him, to proceed and sell the lands, at such time and place, and on such terms as this court may direct; that the proceeds of sale may be distributed between the heirs of said estate," &c.

The court thereupon made an order, which recited the filing of the petition, fixed a day for the hearing, and appointed a guardian *ad litem* for the minors, who was ordered to appear at the appointed time and defend the interest of

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his wards. The court further "ordered that a commission issue to S. D. Hubbard and John M. Shields to take testimony in the cause, and that they report the same to the court on or before October 21st, 1856," the day set for the hearing.

The order of sale recites the filing of the petition, &c.; that the guardian *ad litem* appeared and denied in writing all the allegations of the petition, &c., and then proceeds, "and E. M. Kerr, heretofore appointed commissioner to take testimony in said cause, having reported the same, which by order of the court is approved, and ordered to be filed among the papers of the said estate; and the court proceeded to examine said testimony, and from said testimony it appears to the court that said lands can not be equitably divided among the heirs-at-law, without a sale thereof; and also that it would be more to the interest of said minors to sell said property, and reinvest the proceeds of the same in some other property, as bonds, bills of exchange," &c. Then follows a regular order for the sale of the lands, on a credit of twelve months, with directions to the administrator to make a return, &c., within sixty days.

The sale was made, the administrator selling the lands in lots as the order authorized. He reported the sale, and that George W. Lowe was the highest bidder for the lands at the sum of \$2065, and that he had fully paid the purchase-money. The court finding that the sale had been fairly conducted, &c., and the terms thereof complied with, by payment of the purchase-money, made an order confirming the sale and directing the administrator to make a conveyance to Lowe. It seems that this was never done.

After this, Lowe conveyed the land here in dispute to Bibb, the administrator, for \$600, which was its fair value. Bibb conveyed to one Bailey, who, in 1860, conveyed to the appellee.

Bibb made a final settlement of his administration in the year 1860, in which he charged himself with the amount of the purchase-money paid by Lowe. Decrees were rendered against him in favor of the heirs for their respective shares; and he afterwards becoming their guardian, charged himself on his settlements as such with the amount of said decrees. He settled his guardianship in 1868, and it appeared therein that nearly all the money he had received had been expended in their maintenance.

The chancellor decreed that appellee was entitled to relief, and rendered a decree perpetually enjoining the prosecution

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of the action of ejectment, or other interference with appellee.

This decree is now assigned as error.

R. M. WILLIAMSON, for appellant.—The allegations of the petition did not give jurisdiction. There is no averment that the land can not be “equitably divided,” but the writer of the petition draws the inference that “from the facts herein set forth, it is manifest that the said lands can not be equitably divided between the heirs of said estate unless by a sale of the same.” Now, the only facts which are thus set forth in the petition, having any bearing upon the susceptibility of said land for equitable division are, that there is a large body of land, and that the main value thereof consists in its suitability for “building lots;” that the improvements are inconsiderable, and that only two children, under ten years old, are the owners of the same. These facts, instead of justifying the inference drawn from them by the petitioner, show that such land could be very easily divided between the owners.

2. There is no deposition of witnesses in the probate record, and the only mention of any testimony in the record is in the decree of sale, which mentions “E. M. Kerr,” commissioner, heretofore appointed to take testimony in said cause, &c. Whether the testimony was taken in interrogatories, or whether the guardian *ad litem* crossed the same, or had an opportunity of doing so, or who the witnesses were, or by what authority “E. M. Kerr” became a commissioner, or what facts the testimony established, or tended to establish, is all left to conjecture—it does not appear from the record. The order further recites that it appeared from the testimony that an equitable division could not be made of the land, and that a sale of the same, and an investment of the proceeds, would be more to the interest of the heirs; but on which of these grounds the order is made is uncertain, or whether made on the supposed existence of both grounds. There is no compliance with section 2225 of the Revised Code, and the order and this sale are void.

SAYRE & GRAVES, *contra*.

MANNING, J.—The irregularities and errors in the proceedings of the Probate Court upon the application of Algernon S. Bibb as administrator of the estate of Mary Terry, deceased, (of whom appellees were heirs-at-law,) for the sale

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of the land embracing the parcel now in controversy, were such as would have compelled us to reverse the decrees of that court, if upon proper objections and assignments of error, they were under review upon an appeal therefrom, and nothing more was disclosed by the record, than is now here shown. But that sale was made in 1857, before the late war; and it is attacked collaterally in a suit of appellees, which treats it and the proceedings of the Probate Court relating to it, as wholly void. Whether they are so or not, depends, in the first place, upon the question whether the Probate Court had jurisdiction to decree a sale of the land, and not upon an inquiry into the correctness or error of its acts in exercising that jurisdiction. This has been long settled in this State, by judicial decisions.—*Wyman v. Campbell*, 6 Porter, 219; *Doe ex dem Duvall's Heirs v. McLosky*, 1 Ala. 709; *King v. Kent's Heirs*, 29 Ala. 549, and cases there referred to; *Satcher v. Satcher's Administrator*, 41 Ala. 26; *DeBardelaben v. Stoudenmire*, 48 Ala. 643; *Wright's Heirs v. Ware*, 50 Ala. 549; *Pettus v. McClanahan*, 52 Ala. 55.

It has also further been ruled that when proceedings and a decree of this kind are brought into question collaterally, "public policy requires that all reasonable presumptions should be made in support of such sales," and that "if a different rule prevailed, purchasers would be timid and estates consequently be sold at diminished value, to the prejudice of heirs and creditors."—*Goforth v. Longworth*, 4 Ohio, 129, cited in *Wyman v. Campbell*, 6 Porter, 242, and in other Alabama cases. In the case last named, COLLIER, C. J., said: "It is impossible to conjecture the vast amount of property holden under sales made by order of the Orphans Court, and we all know that in at least three-fourths of the cases, the records are remarkable for their want of technicality and legal precision." Of the application to sell, this court in *King v. Kent's Heirs*, declared: "When the petition is directly assailed, the question is one of pleading, and the intendments are made against the pleader: but a different rule prevails when the proceedings have gone into a decree under which rights of property have attached. Then, every reasonable intendment in the construction of the language of the petition must be in favor of the validity of the paper. . . . We should understand the petition as it is reasonable to infer that the party who made it and the judge who acted upon it, did understand it, and not as they were bound to understand it."—29 Ala. pp. 553, 554. And again in *Wright's Heirs v. Ware*, 50 Ala. pp. 557–8, it was reiterated:

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“If the sufficiency of the petition had been put in issue by demurrer, or assailed on error, judgment against it must have been pronounced. Then, as has been said in this court, all intendments would have been indulged against the pleader. When the proceedings ripen into a decree and are collaterally assailed, and rights of property have attached, the rule is changed, and every reasonable intendment is made in favor of the validity of the decree. All questions of pleading which the court had a right to decide, are conclusively adjudicated, and whether correctly or not is not the subject of inquiry. . . . Reading the petition as it was doubtless read by the Court of Probate, and intended by the petitioner to be read, it must now be considered as averring the conviction of the petitioner—that a sale of the lands was more beneficial than of the slaves: and thus read it fully supports the jurisdiction of the Court of Probate.” *Id. ibid.* It is quite clear upon the authority of these cases, and the similarity of the averments in the petitions upon which the two latter were founded to those made in the present case, that the allegations of Bibb, the administrator, of the size and situation of the parcel of land of which he prayed a sale, of the fact that it had but one residence or dwelling-house with its appurtenant out-houses thereon,—which needed repairs that the heirs were unable to make, and of their inability to improve the land, concluding with the words, “it is manifest that the said lands can not be equitably divided between the heirs of the said estate unless by a sale of the same,” are to be taken as equivalent to a direct averment to that effect, and as bringing into exercise the statutory jurisdiction of the Probate Court to sell this real estate. The petition was certainly understood by the probate judge as alleging of the land “that the same can not be fairly and equitably divided between the heirs-at-law,”—for, he so describes it in the minute entry showing when it was filed; and that allegation contains the very words of the act.

But, though it be thus shown that the jurisdiction to sell was acquired, yet according to a statute of 1854, (now section 2458 (2225) of the Code of 1867,) “no order for the sale of land belonging to any estate must be made, when there are minors or persons of unsound mind interested in such estate, unless the Probate Court has taken evidence by deposition as in chancery proceedings, showing the necessity of such sale. . . . Any order of sale and sale made without a compliance with the requisitions of this section, shall be

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wholly void." And on behalf of appellants, it is contended that no such depositions are produced or shown to have been taken, and the order of sale and sale were therefore void.

An entry on the minutes of the court of its proceedings on the day when the petition was considered and the order of sale made, after a recital of the appearance of the heirs by their previously appointed guardian, sets forth that "E. M. Kerr, commissioner heretofore appointed to take testimony in said cause, having reported the same," it "is approved and ordered to be filed; . . . and the court proceeded to examine said testimony, and from said testimony it appears to the court that said land can not be equitably divided among the heirs-at-law without a sale thereof," &c.; whereupon the order of sale was made. This brings the case directly within the ruling upon this very point of *Wright's Heirs v. Ware*, *supra*. And "testing the recitals of this record by the presumptions extended to judicial proceedings when collaterally attacked, we feel justified in declaring that it appears from the record that depositions proving the necessity of sale, were taken as in chancery proceedings." Hence, the argument founded upon this supposed defect falls to the ground.

The propositions discussed are the only ones on which it could be contended that the orders and decrees of the Probate Court are void. So far as they were merely voidable and might have been reversed on appeal for error, they can not be collaterally assailed; and to what extent they might have been so impugned, we need not now inquire.

The record shows that the Probate Court had jurisdiction to make the sale, and was, in fact, the vendor of the land through the agency of the administrator. Under its order, the land was sold, and the sale was reported to and confirmed by it. Also, upon the report of the administrator that the price had been paid by the purchaser, Lowe, to him, its final decree was made in pursuance of the statute, empowering the administrator to convey to Lowe, his heirs and assigns, all the right, title, interest and estate which the deceased Mary Terry had in the land,—judicially determining that the purchaser having paid for the land, was owner thereof, and entitled to such a deed of the same. Lowe, after the sale to him, "conveyed the lands in dispute" to Algernon S. Bibb, the administrator, for \$600, and he conveyed to one Bailey, who, in 1860, conveyed to appellee, a corporation now named The Bishop Cobbs Orphan Home.

The record further shows that the administrator, on his
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final settlement in 1860, charged himself with the purchase-money (over \$2000) of the land sold to Lowe; that to each of the heirs, appellants in this cause, their respective shares were allotted by the decree of distribution then made; that the administrator, who was their father, having in the same year been appointed guardian of each, and executed his bonds as such, with sureties, debited himself and was charged in his settlements as guardian in the Probate Court, with all the moneys awarded to them as their shares of Mrs. Terry's estate, and that a settlement of his guardianships was made in 1868, showing that most of the amount in his hands as guardian, had been expended for the support and maintenance of his wards. And it is not averred or intimated in the answers of appellants, that there was any fraud or breach of trust or violation of duty, on the part of said administrator or Lowe, in any transaction relating to the sales of the land or of any part thereof. We must, therefore, hold, it not appearing that a conveyance was made according to the decree of the Probate Court, by the administrator to Lowe, that a good equitable title to the lot in controversy is vested in the appellee, which justified the orders and decree of the chancellor restraining and perpetually enjoining appellants from prosecuting their action to recover said lot from that corporation, or in any way interfering with its right to or possession of the same. The chancellor might properly have gone further, and required a conveyance to complainant below, of the legal title thereto, remaining in appellants.

Let the decree of the chancellor be affirmed.

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Indictment for Arson.

1. *Evidence; what relevant in proof of motive, &c.*—Where an offense is committed against the person or property, the relations existing between the accused and the injured person, or acts or declarations of the prisoner, manifesting unfriendliness or hostility, at and prior to the commission of the offense, are relevant evidence, in connection with the other facts and circumstances, as tending to connect the prisoner with the offense.

2. *Same.*—Thus, on trial of an indictment for arson of the prosecutor's mill, it may be shown that the prisoner had had prior difficulties with the owner; that he and others had prosecuted the mill owner for a nuisance, and remarked that some of those engaged in the prosecution would yet burn the mill.

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3. *Same; effect and weight of.*—The jury must determine, in view of all the facts and circumstances of the particular case, what weight such evidence should have; and though the time elapsing between the formation of the hostile relations, or acts manifesting it, and the commission of the offense, may greatly weaken the evidence, it does not render it inadmissible.

4. *Same; what evidence irrelevant.*—A defendant who has been allowed to show that others stood in the same relation as himself towards the prosecutor, and had the same motive to commit the offense, can not complain that he was not permitted to show who such other persons were.

5. *Charge; when not error to refuse.*—Where the offense charged includes a lesser, value being a material element of the higher offense only, a charge so worded as to lead to an acquittal entirely, upon a reasonable doubt as to value, is properly refused.

6. *Value of property; what may be considered in determining.*—Not only the cost of erecting a mill and placing machinery in it, but also their enhanced value by reason of location, other circumstances, and the general patronage and profits derived from it, may be considered in determining the value of the mill; and a person shown to be conversant with these matters, may give his opinion as to its value.

7. *Evidence; what not admissible to refresh recollection.*—Entries upon the tax books, not made by the owner, or under his direction or authority, showing the assessed value of a mill, are not admissible for the purpose of refreshing his memory, as to who returned the property for taxation, or the amount at which it was assessed.

APPEAL from Circuit Court of Conecuh.

Tried before Hon. JOHN K. HENRY.

The appellant, Walker A. Hudson, was convicted under an indictment which charged that "he wilfully set fire to and burned a mill, which said mill was then a grist mill, and which said mill and the property therein contained was then and there of the value of five hundred dollars, the property of W. B. Shaver and John Brown, against the peace," &c. The State introduced one W. B. Shaver, who testified that he and John Brown were the owners of a grist mill, situated in Conecuh county, and that said mill was burned in the month of November, 1876. This witness testified that the mill-house and machinery which was in and attached to it, was worth five or six hundred dollars, and that there was in the mill at the time of its burning about forty or fifty dollars worth of property. This witness was asked by the State, if he and the defendant had had difficulties prior to the burning of the mill, and in reply he stated that, "he and defendant had a difficulty in 1866 in a matter, not about the mill." To this question and answer the defendant objected; his objection was overruled, and he excepted. Witness was then asked if he and defendant had had any difficulty since 1866. He answered that in 1868, he had a difference or difficulty with defendant and some other citizens of his locality, about establishing the mill which was burned. To this

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question and answer the defendant objected; his objections were overruled, and he excepted. The witness was then asked, if he had any conversation with the defendant about burning the mill, and he answered that about two years before the mill was burned, defendant told him that "some of those fellows who was engaged in that prosecution about putting up the mill, would burn it up." Witness then testified that he had been prosecuted for keeping up the mill, and that the defendant employed counsel to conduct the prosecution.

On cross-examination, this witness was asked who else of the citizens engaged in the prosecution against him. The State objected to the question, and the court sustained the objection, and defendant excepted. The defendant then asked witness, if he had not given in the mill for taxes at the value of two hundred dollars, for several years before it was burned, and the witness having answered that sometimes he, and sometimes his neighbors had given in the mill for taxation, and that he did not recollect what years he had given it in, or the value as returned in the assessment, the defendant offered to introduce, for the purpose of refreshing the memory of witness, the tax book for the year 1867. The State objected to its introduction, and the court sustained the objection, and defendant excepted.

The State then introduced one Thomas, who testified that he was the miller at the burned mill, and had been thus employed for about a year. In reply to a question by the State as to the value of the mill, this witness testified that it was worth five hundred dollars. On cross-examination this witness stated that the mill was made of plank and hewn timber, and then described the character of the timbers and the construction of the house. Witness was then asked to state what the mill-house was worth, taking into consideration the kind of material it was built of, and in this estimate not to take into consideration what the patronage of the mill was, but looking alone to the actual cost of the material and of construction, and all the machinery and contents at the time it was burned. He answered that the contents and material and work would be worth about three hundred and fifty dollars. The State then asked the witness to "state the value of the house as a mill," and he answered, five hundred dollars. The defendant objected to this question and answer; his objection was overruled, and he excepted. The defendant after introducing several witnesses as to the value of the mill, including Brown, the joint owner, all of whom

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placed its value at less than five hundred dollars, offered to introduce in evidence the tax books for the years from 1868, up to and including the year 1876, for the purpose of contradicting the witness for the State, and as showing the value of the mill. The court, on objection by the State, would not permit the tax books to be introduced, and defendant excepted. The defendant requested the court in writing to charge the jury, "if there is any doubt as to the value of the property as alleged in the indictment from the evidence, then the defendant must have the benefit of every reasonable doubt." The court refused the charge, and defendant duly excepted. The jury found the defendant "guilty as charged in the indictment," and sentence was passed accordingly.

R. M. WILLIAMSON, and J. T. HOLTZCLAW, for appellant. The court should certainly have permitted the defendant to show who else beside himself was interested in the prosecution of the owners of the mill. It tended to show that others had an equal motive to burn the mill, and would have weakened the testimony, tending to identify defendant as the person who did the burning. The tax books should have been allowed to go to the jury on the question of value. They should have been shown to witness to refresh his recollection, he having stated that he did not remember who returned the mill, or at what value it was returned.

H. C. TOMPKINS, Attorney-General, *contra*.—The fact that others than the witness had the same motive for burning the mill, could not of itself be any evidence that the defendant did not commit the crime charged, nor could it lessen the probabilities of his having done so.—54 Ala. 527; 9 Ala. 990; 4 Dev. 328; 1 Mass. 143. The value of the building as a mill was the true inquiry. The burning deprived the owner of the use of the building as a mill, and if as a mill it was worth five hundred dollars, the offense of arson in the second degree was committed. The tax books were inadmissible; it was not shown who made entries therein, nor was the defendant shown to have made any of the entries sought to be used as evidence.—1 Whart. on Ev. §§ 517, 521, 523.

BRICKELL, C. J.—1. In criminal cases, the *corpus delicti* being established by evidence *aliunde*, there are many minor facts, or evidentiary circumstances, which are admissible to implicate the accused. "They are resorted to," says Mr. Burrill, "as elements of evidence, not from any supposed

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necessity of accounting for, or explaining the reason of a criminal act which has been clearly proved and fixed upon the accused, however strange and inexplicable such act may in itself appear, but from the important aid they always render in completing the proof of the commission of such act by the party charged, in cases where it might otherwise be thought to remain in doubt." When the offense is against the person or property, the relations existing between the accused and the injured person, prior to and at the time of the injury, in conjunction with other circumstances, may disclose a motive, either of gain, or of revenge, on the part of the accused, which will aid in identifying him as the wrongdoer. Such relations the prosecution may prove, and what are the proper inferences to be drawn from them—the weight to be attached to them, lies within the province of the jury, and depends upon the circumstances with which they are connected. The time which may have elapsed, since such relations were formed, and openly manifested as hostile, before the injury was committed, may lessen their weight as evidence, but can not render them inadmissible. Other evidence, connecting the accused with the offense, may be requisite to fix his guilt—evidence more clearly and directly pointing to him as the offender; but his past relations to the person injured, the motive to do the injury which may spring from these relations, may not have been changed or removed by the mere lapse of time. The force of the fact, time may diminish, but does not entirely destroy. Or, if new and amicable relations have been formed—or any other change of circumstances, which may diminish the probative force of the fact, can be shown—the fact must be taken in connection with these, and it may be shorn of all practical value as evidence, without affecting its admissibility.

The evidence of prior *difficulties* (by which we understand disputes, or controversies or quarrels begetting ill-will), between the accused and one of the prosecutors in 1866, not in reference to the mill burned; renewed in 1868 in reference to the building and keeping up of the mill—the prosecution against the prosecutors for a nuisance in keeping up the mill, the employment of counsel by the accused to conduct that prosecution—his declaration, that "some of those fellows who were engaged in that prosecution about putting up the mill, would burn it;" are all minor facts having a tendency to implicate him in the crime committed in 1876 in burning the mill. Their sufficiency may depend upon their conjunction with other criminating circumstances. The

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time elapsing before the injury, after these relations were formed, and the manifestation of ill-will growing out of them, may be so great that their value as evidence would be measured by the number and character of the circumstances with which they are connected; but this does not affect their admissibility.

2. The fact that others than the accused were engaged in the prosecutions against the present prosecutor, for keeping up the mill, had been shown. Who such persons were, was not a material inquiry. If any inference favorable to the accused could be drawn from the fact, that others stood in the same relation to the prosecutor, and had the same motive to burn the mill, which could be imputed to him, the fact was proved as the basis of the inference. Their identity or individuality, would not strengthen the inference unless it were proposed to extend the inquiry further into their good or bad character, or their acts or declarations. Such an inquiry would be too remote from the facts really in issue.

3. Arson in the second degree, the offense charged against the appellant, consists in the burning of several designated structures or buildings devoted to particular uses or purposes, public or private, and of these is a manufactory, or mill which with the property therein contained, is of the value of five hundred dollars or more.—Code of 1876, § 4347. Arson in the third degree, consists in the setting fire to, or burning any house or building, and other designated property, under such circumstances as do not amount to arson in the first or second degree.—Code of 1876, § 4348. The difference in the elements of arson in the second and third degree, so far as this case involves it, is in the value of the mill and the property contained in it. If the value does not reach five hundred dollars, the offense can not be arson in the second degree. The value of the property is, therefore, a material ingredient of the higher offense with which the appellant stands charged. The expense or cost of erecting the house, or the cost of the machinery, are not the only elements of the value. These would not alone be considered by a purchaser, but the enhanced value of these, by reason of the location or other circumstances, and its general patronage, and the profits derived from it, are all elements of value, and to be considered by the jury in determining whether it was of the value of five hundred dollars, or more, or less. It is possible a mill, or other building intended for particular uses, may be so illy adapted to such use, or so illy located, that though its erection may have cost greatly more

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than five hundred dollars, the real value in consequence of these circumstances, is much less than that sum. The value of the house *as a mill*, that is considering the uses to which it was appropriated, the machinery appurtenant, the location, the advantages the location gave it, and the profits derived from it, were all proper to be considered. The court properly permitted the witness Thomas to state the value of the house *as a mill*. He had been the miller operating the mill, and had the requisite knowledge to enable him to give his opinion, and the correctness or worth of the opinion could have been tested by a cross-examination.

4. The entries on the tax books showing the assessed value of the mill, were not made by the prosecutor, or under his direction, or by his authority, and they were inadmissible to refresh his memory, or for any other purpose. If the tax assessor who made the entries had been called to prove the value of the mill, it would have been permissible for him to refresh his memory by them; or, if it had been shown that the entries had been made on Shaver's statement of the value of the mill, the person making the entries could have refreshed his memory of the statements by reference to them, and the statements would have been admissible to contradict Shaver. As evidence for any other purpose, or under any other circumstances, the tax book was not admissible.

5. In all criminal cases, the guilt of the accused must be fully proved. A reasonable doubt of the existence of any fact essential to guilt, is fatal to the accusation. Malice is an indispensable element of murder. An unlawful killing may be clearly shown; but if there is a reasonable doubt whether it proceeded from malice, or sudden passion aroused by immediate provocation, malice, the indispensable element of murder, not being fully proved, the slayer can not be convicted of murder, though he may be of manslaughter, of which malice is not an element. The value of the property set fire to, or burned, is an indispensable element of arson in the second degree, the offense with which the appellant was charged. A reasonable doubt as to the value, though every other fact essential to criminality had been fully proved, entitled him to an acquittal of the offense charged, though he could have been convicted of the lesser offense, arson in the third degree, necessarily involved in the offense charged. If the instruction requested and refused, had been so framed as to express clearly this proposition, it would scarcely have been refused by the Circuit Court. As it is framed, the Circuit Court properly refused it; for if given, the court, to

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prevent the jury being misled and confused, and to inform them of the consequences of the insufficiency of evidence of value, must have given additional and explanatory charges, showing that if all other necessary elements of the offense were proved, the insufficiency of the evidence of value, did not compel them to an acquittal, but it was their duty to find the accused guilty of the lesser offense, of which the value of the mill was not an element. A court is never bound to give instructions requiring explanation, or further instructions, to save the jury from being misled or confused.

We find no error in the record, and the judgment must be affirmed.

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Appeal from Order disallowing Claim against Insolvent Estate.

1. *Objection to claim against estate; when must be filed.*—The allowance of a claim duly filed against an insolvent estate, is matter of right, unless objections to its merits be filed within twelve months after the declaration of insolvency; and all matters of defense existing within that period and not duly filed, are forever barred.

2. *Same.*—Matters subsequently occurring, which are a valid bar to the demand, or which deprive the creditor of all right, in equity and good conscience, to share in the distribution, may be shown at any time before final decree declaring the amount of the claim, and the rateable proportion of assets to which the claimant is entitled.

3. *Claim of wife against husband's estate for conversion of statutory estate; what not bar to assertion of.*—Where the husband bought lands with the wife's statutory estate, taking title to himself, and his administrator sells them and collects the proceeds, the wife's pursuit of the funds in his hands as trust money, and compelling their payment to her under decree in chancery, is not inconsistent with her right to hold the estate liable, and no bar to her demand for the balance due, after crediting the amount coerced from the administrator.

APPEAL from Butler Probate Court.

Tried before Hon. J. L. POWELL.

Joseph G. Thames died in 1863, and the appellant, his widow, filed her claim against his estate for the *corpus* of her statutory estate, received by him, amounting to \$2,995.81.

On the first day of April, 1867, the estate of Joseph G. was declared insolvent, and on the 21st of October, in the same year, the appellant filed her claim, duly verified, against

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the insolvent estate. On July 30th, 1869, appellant filed her bill in the Chancery Court against the appellee, Herbert, as administrator *de bonis non* of her deceased husband, alleging the above facts, and that the money so received by her husband, had been invested by him in the purchase of certain lands, and in the erection of improvements thereon, he taking title to the land in his own name. The bill alleged further, that the lands had been sold by the administrator-in-chief, and that the proceeds, amounting to \$1,350, were in the hands of appellee. The Chancery Court rendered a decree, declaring a resulting trust in her favor in the lands, and ordered the administrator to pay over to her the proceeds of said lands, with interest. This decree was rendered on the 18th day of October, 1873, and was paid and satisfied December 1st, 1873.

On March 16th, 1878, the day set for the final settlement of the insolvent estate, appellant moved, in the Probate Court, for a judgment against the estate on her claim previously filed, less the amount received by her under the decree of the Chancery Court. To the allowance of the claim, Herbert, the administrator *de bonis non*, and several creditors objected, on the ground that her claim had been fully paid and discharged by the payment of the chancery decree, and that having elected to pursue the funds received by her husband into the property bought with it, and having received the whole of the proceeds of said land, she could assert no claim against the estate.

The appellant demurred to these objections, on the ground that they were not filed within twelve months after the filing of her claim against the insolvent estate, as required by the statute. The court overruled the demurrer; and the proof sustaining the objections, disallowed the claim. The appellant excepted, and brings the case here by appeal.

JOHN GAMBLE, for appellant.—The question is, can objections be allowed, when not made within twelve months after the filing of a claim against an insolvent estate? The statute expressly declares, that objections to claims filed against an insolvent estate *must* be filed within twelve months after the declaration of insolvency; and it is further provided, that if no opposition is made within twelve months, after the time when the estate was declared insolvent, such claim must be allowed against the estate, without further proof. The record shows clearly that no objections to this claim were filed until four or five years after the estate had

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been declared insolvent. The case of *Hardy v. McEachem*, 33 Ala. 457, is directly in point, and it was there ruled that claims against insolvent estates *must be* allowed, if not objected to within twelve months. The objections here filed go to the merits of the claim, and they can not be made after the expiration of twelve months.—See 21 Ala. 42; *ib.* 112; *ib.* 194; 10 Ala. 520; 8 Ala. 454; 20 Ala. 772. There was nothing in the chancery proceedings inconsistent with the right of the appellant to insist on her claim against the estate. The scope of the bill and the effect of the decree, were simply to declare that the estate had received money from the sale of property, which equitably belonged to her, and to have the money then in the hands of the administrator paid over to her. It did not, and could not amount to an election, to take the proceeds of land and release the estate. It could not operate as a payment of the claim. The estate owed her the amount her husband had received of her statutory estate. The estate paid her only the amount it had received from a sale of the property purchased with her money, which was a much less sum. The estate certainly owed the difference between these amounts; and her claim to that extent, was a proper one, and the objections to it should have been overruled.

DAVID BUELL, *contra*.—The appellant received under the chancery decree every dollar of the proceeds of the property bought with her money. Appellant elected to look to the proceeds of the land, and she can not after she has received the full benefit of that election, hold the estate for any difference. She is conclusively estopped from claiming anything against the estate.—*Adams v. Adams*, 39 Ala. 274. This election on her part was made after the time for filing objections. The objections to her claim was not as to its validity, but on the ground that it had been fully satisfied, and discharged, by virtue of the chancery proceedings. She elected in that proceeding to claim the property as bought with her money—she did not claim a lien on the lands, but she claimed the land itself, or what was equivalent, the entire proceeds of the sale. The decree was not the enforcement of a lien; it was the declaration of a resulting trust in the land. Surely it is inequitable to say that she shall have both the land and her debt. The liability of the estate of the husband grew out of the investment of her money in this land, and in taking title to himself. If he had taken the title to her, surely she could claim nothing of the estate.

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She is placed by this decree exactly in the position she would have occupied had the title been made directly to her. She has all she could have had, if the act which fixed the liability of the husband had never been done. The estate has reaped no benefit from the investment of her money, and should not be made to pay the debt and give up the property and its proceeds.

BRICKELL, C. J.—From the earliest period of our legislative history, it has been a settled policy to provide a simple and summary remedy, in the court of probate, granting letters testamentary, or of administration, for the marshaling and distribution to creditors of the assets of an insolvent estate. The personal representative when satisfied of the insufficiency of the assets for the payment of debts, is required in a particular mode to make report of the fact to the court, and of the report notice must be given creditors, who are entitled to contest its truth. If there is no contest of its truth, or if it is unsuccessfully contested, a decree of insolvency is pronounced by the court. The decree ascertains finally the *status* of the estate as between the personal representative and creditors.—*McGuire v. Shelby*, 20 Ala. 356; *State Bank v. Ellis*, 30 Ala. 478. The effect is, to draw to the court exclusive jurisdiction of all *legal demands* against the decedent, not the subject of pending suits in other tribunals, at the time of the rendition of the decree. Suits then pending, may be prosecuted to final judgment, but on a suggestion, or special plea of the insolvency, the judgment rendered therein is certified to the court of probate, and no execution can issue on it. All the creditors, (excepting those whose claims are in suit at the time of the declaration or decree of insolvency,) are required within nine months after the decree or declaration, to file their claims in the court of probate verified by the oath of the claimant, or some other person who knows its correctness; and a failure to file, by the words of the statute, operates a perpetual bar against the claim.—Code of 1876, § 2567; *Puryear v. Puryear*, 34 Ala. 555; *Sharp v. Sharp*, 35 Ala. 572; *Bell v. Andrews*, ib. 538; *Ray v. Thompson*, 43 Ala. 434; *Murdock v. Rosseau*, 32 Ala. 611; *Hollinger v. Holley*, 8 Ala. 454. The exception of claims on which suits are pending, from the bar of the statute, is the result of judicial decision, which, though in conflict with former decisions, perhaps, ought not now to be disturbed.—*Erwin v. McGuire*, 44 Ala. 499; *Murdock v. Rosseau*, *supra*; *McDougald v. Dawson*, 30 Ala. 553. The end

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proposed to be accomplished by the statutes is, that on the files of the court of probate, at the expiration of nine months from the decree of insolvency, open to the inspection of the personal representative, and of all creditors, every claim entitled to share in the distribution of the assets shall be found; and to avoid the introduction of spurious claims, that each claim shall be verified by the claimant, or by some person who knows its correctness, and that it is due.

The purpose of the statute is to draw within the jurisdiction of the court of probate all claims against the decedent, and all controversies as to the validity of the claims preferred. Yet all is in furtherance of a speedy distribution of the assets to the creditors entitled to receive them. The claimant is required at the peril of the loss of his demand to file it within a prescribed period, and as evidence of his good faith, and of the justice of the claim, it must be verified. The verification is *ex parte*, and is not matter of evidence against the administrator, or other creditors, who may assail the validity and justness of the claim. An opportunity to controvert its correctness by the administrator, or by other creditors, the statute affords. The same policy which demands that within a particular period, the claim should be filed, requires that there should be a period within which the contestation of their correctness should be made. The speedy settlement and distribution of the assets, could not be otherwise promoted.

The statute therefore requires that if no opposition to a claim filed, is made by the administrator, or by any other creditor, within twelve months after the declaration of insolvency, by filing objections thereto in writing, the claim must be allowed.—Code of 1876, §§ 2574-5. The allowance of the claim, in the absence of an objection within the prescribed time, is a right of the creditor secured by the statute.—*Hardy v. Meachem*, 33 Ala. 457; *McNeil v. Mason*, 20 Ala. 772. As to all matters of objection addressed to the validity or justness of the claim, which exist at the expiration of the period prescribed for filing objections, this is the effect of the statute. Though the creditor is entitled to an allowance of the claim free from, or without regard to such objections, the claim is not allowed, it is not sanctioned by the judgment of the court, its amount is not ascertained and declared, until the court renders a decree in favor of the creditor for his rateable proportion of the assets in the hands of the personal representative. After the expiration of the period for filing objections, and before the rendition of this decree, facts

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may occur which are a valid bar to the demand, or which deprive the creditor of all right in equity and good conscience to share in the distribution of the assets. The statute was not designed to prevent such matters, not occurring within the time prescribed for objecting to the allowance of the claim, from being introduced, and when shown, from operating a bar to the claim. The deceased may be liable only as surety, and the principal may pay the debt after the expiration of the prescribed period. Or the creditor may have a security by way of mortgage, or pledge, which he may render available, extinguishing the claim. In either event, if he was allowed to participate in the distribution of the assets, it would not only work injustice, but would defeat the policy which pervades the statute, of securing equality to the creditors. The objections to claims which are unavailable, if not filed within the prescribed period, are objections founded on facts or matters then existing, and not objections founded on matters subsequently occurring, which could not then have been made the ground of objection. Such objections may be interposed at any time before the court renders a decree distributing to the creditor his rateable proportion of the assets.

The objections to the claim of the appellant, were of matters occurring after the period prescribed for filing objections, and if they are well founded—if they constitute a valid defense against the claim, it was the duty of the court to entertain them.

The claim of the appellant is for moneys received by the intestate of the appellee, Herbert, of the *corpus* of the appellant's statutory separate estate, received by the intestate as her husband and trustee. After the filing of the claim, and the expiration of the period for filing objections to its allowance, the appellant filed her bill in equity averring the intestate had used the moneys in the purchase of certain lands and in making improvements thereon. Further averring a sale of the lands by the administrator-in-chief under a decree of the Court of Probate, the payment of the purchase-money to him, and praying that the said purchase-money be declared trust funds and appropriated to the payment of her claims. A final decree was rendered declaring the appellant was entitled to recover said purchase-money, and the same not equalling the claim of the appellant, when paid was to be credited thereon. Payment thereof having been made, on these facts the appellee objected to the allowance of the balance of the claim, and to a decree distributing to the ap-

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pellant any portion of the assets in the hands of the administrator. The objection was sustained, and the balance of the claim disallowed. The argument in support of the objection, is, that a pursuit of the proceeds of the sales of the lands, on the ground of a trust, is inconsistent with a claim as a creditor against the assets in the hands of the administrator. It is a rule of very general application, just in its operation and consequences, that a party shall not claim in repugnant rights, and that he shall not take a benefit without bearing the burden which may be incidental to it. But we are unable to see of what application the rule is to these facts, or the repugnancy between the claims the appellant has preferred. When a trustee, or other person standing in a fiduciary relation, employs the trust funds which may be in his hands, in the purchase of lands, and takes the conveyance to himself, the *cestui que trust* may, at his election, charge the trustee personally, or claim the purchase as having been made for his benefit and take the land.—*Tilford v. Torrey*, 53 Ala. 120; 1 Lead. Eq. Cases, 277-8; 1 Perry Trusts, §§ 127-8. If he elects to take the land, of course he could not subsequently, unless the election was made under such circumstances, that a court of equity would not hold him bound by it, assert any claim against the trustee personally. All such claims would be satisfied by taking the land, and the recognition of the purchase as an investment of the trust funds. But if he elects to pursue the trustee personally, he may use his hold on the lands, as a security for the payment of the funds employed in their purchase. If from the land, he obtains satisfaction only in part, there is no greater repugnancy in his pursuing the trustee for the remainder, than there is in the mortgagee pursuing the mortgagor personally for the balance of the debt the property mortgaged may fail to pay. The adoption of the argument of the appellees would enable the trustee to profit by his wrongful acts at the expense of the *cestui que trust*, and would lead to consequences manifestly inequitable. The *cestui que trust* would be compelled to accept whatever injudicious or unauthorized investments of the trust funds the trustee may make, or to relinquish them, and all security they afford, standing in no other attitude than that of a mere creditor, while the trust funds would swell the assets in which all creditors participate. It was a clear equity of the appellant to follow the trust funds into the lands purchased and improved with them by the trustee, and to charge them with the repayment of the trust funds. So, as was declared

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by the decree of the Court of Chancery, she could pursue in the hands of the administrator the purchase-money he had derived from their sale. Thereby she did not elect to take the lands as having been purchased for her benefit, but simply to charge them with the repayment of the trust funds. Satisfaction in part only having been obtained, for the remainder, as a creditor having exhausted her securities, she was entitled to a rateable proportion of the assets in the hands of the personal representative. The Court of Probate erred in disallowing her claim, and the decree must be reversed, and the cause remanded.

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Appeal from Order allowing claim against Insolvent Estate.

1. *Claims against insolvent estate; statutes concerning filing of, construed.* The purpose and object of the statute requiring the filing of claims against an insolvent estate, are complied with, when a statement of a claim is filed, which when taken in connection with the affidavit accompanying it, fairly discloses an existing liability preferred against the estate.

2. *Same; statutes relating to, construed.*—The administrator of a creditor filed as a claim against an insolvent estate, an attorney's receipt for promissory notes made by the insolvent intestate, which described with particularity, the date, makers and payee, the amount and time of payment of each note, and that each bears interest from date. Appended to this receipt, was the affidavit of the administrator, that he believes of his own personal knowledge, that the annexed receipt for claims or notes therein described, for \$2008 and interest, to be counted in favor of "the estate" of which affiant was administrator, against the insolvent estate, "is correct, and that the same is justly due and unpaid,"—*held*: This was a substantial compliance with the statute; the affidavit, fairly interpreted, showing that the claim filed was for the notes, and not upon the receipts, in which they were described.

3. *Defenses, what can not be made, if not presented within twelve months.* Where no objection to the merits of a claim, duly filed against an insolvent estate, is made within twelve months after the declaration of insolvency, all defenses existing or occurring within that period, are barred; but matters subsequently occurring, which are a valid bar to the demand, or which deprive the creditor, in equity and good conscience, of all right to share in the fund, may be made available at any time before rendition of final decree, declaring the amount of the claim and the rateable proportion of assets to which the claimant is entitled.

4. *Same; mode of objection.*—The proper mode of objecting to a plea, filed more than twelve months after the declaration of insolvency, seeking to make available against a claim matters of defense arising within that time, is a motion to strike from the files.

5. *Defective verification; when amendable.*—An insufficient verification to a claim, filed within the proper time, against an insolvent estate, is amendable at any time before final decree.

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6. *Transferee; when may appear in behalf of claim.*—Where a claim against an insolvent estate has been transferred, before objection filed to its allowance, the transferee may intervene and become the actor, when issues are formed as to its allowance. (*Overruling in this respect, Miller v. Parker, 47 Ala. 312.*)

7. *Jurisdiction over insolvent estate; what essential to support on direct attack.*—The jurisdiction of the court of probate over an estate as insolvent, can not be sustained on error, unless the report and decree of insolvency appear of record; the existence of these facts can not be presumed from recitals in the orders of the court.

8. *Disqualification of presiding judge; to what extends.*—When the judge of probate is a creditor, having a claim filed against an insolvent estate, he becomes incompetent, not only as to that claim, but as to the entire administration; and whatever of judicial duty is to be performed in reference to it, must be performed by the register.

9. *Register acting as judge; what record should show.*—When the register in chancery assumes the jurisdiction conferred by statute, where the probate judge is incompetent, the record should affirmatively show the facts which authorize its exercise,—bare recitals in the orders made by him, is an irregular mode of disclosing it.

10. *Motion to dismiss appeal; when too late.*—A motion to dismiss an appeal can not be entertained, after submission of the cause on the merits, without notice to the appellant, and without affording him an opportunity of remedying the defect.

APPEAL from Franklin Probate Court.

This was an appeal from an order made on March 2d, 1877, allowing a claim preferred by the appellee, James E. Moore, against the insolvent estate of Thomas E. Winston, of which the appellant, Lewis B. Thornton, was administrator *de bonis non*.

Moore claimed title to the notes by purchase from the administrator of I. H. Walker. The entry in regard to said claim, in the schedule of claims against the insolvent estate, is as follows:

“A. W. Ligon, administrator of I. H. Walker, files the receipt of attorneys W. L. B. & J. W. Cooper for three several notes made by T. E. Winston *et al.*, due to W. H. Price, administrator of I. H. Walker, and each for \$802 70-100, bearing interest from date, and each dated December, 1860. One due 17th December, '61; one due 17th December, '62; one due 17th December, '63. \$2,408.16.”

On the trial, Moore introduced the receipt, which is as follows:

“FRANKFORT, 17 March, 1869.

“We have this day received of Abner W. Ligon, administrator *de bonis non* of the estate of Isaac H. Walker, three several sealed notes by Thomas E. Winston, John A. Steele, and William A. Peet, each due on its face to Wm. H. Price,

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administrator of the estate of Isaac H. Walker, and each for \$802 72-100—say eight hundred and two and 72-100 dollars—and bearing interest from date, each dated December, 1860. One due 17th December, 1861; one December, 17th, 1862; and one due 17th December, 1863, which we hold for collection as attorneys.

“W. L. B. & J. W. COOPER.”

The affidavit filed with this receipt is as follows:

“Before me S. S. Anderson, judge of probate in and for said county and State, personally appeared A. W. Ligon, who being by me first sworn, deposes and says, that he believes of his own personal knowledge, that the annexed receipt for the claims or notes described therein, for the sum of two thousand and eight and 16-100 dollars, interest to be counted in favor of the estate of Isaac H. Walker, deceased, against the estate of Thomas E. Winston, deceased, is correct, and that the same is justly due and unpaid.”

The receipt was filed and affidavit made before the probate judge on the 17th September, 1872.

Moore also introduced the original notes, which corresponded with the description given of them in the receipt, and an affidavit of Ligon, showing that under the order of the Probate Court, he had sold the notes to Moore, who had paid for them. The appellant objected to the allowance of the claim on the grounds, first, that the receipt filed was not a sufficient statement of the claim; second, that the claim was not properly verified, as required by the statute.” At the same time, Thornton filed a plea of failure of the consideration of the note, which plea was, on motion of appellee, stricken from the files. It appeared from the plea that the defense relied on accrued in March, 1869.

There is no entry in the record showing any order of the court declaring the estate of Thomas E. Winston insolvent, but several of the orders speak of it as an insolvent estate.

There is no minute-entry affirmatively disclosing the disqualification of James E. Moore, the probate judge, and the transfer of jurisdiction to the register; but the caption of the term in which these orders were made, states that it was an “adjourned term held by Amos A. Moody, register in chancery, on account of the interest of James E. Moore.”

After the submission of the cause, appellee moved to dismiss the appeal, on account of irregularities in the bond and certificate.

It is now assigned as error that the court allowed the claim, and struck the plea from the file.

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WILLIAM COOPER, for appellant.—None of the notes were ever filed by originals or by copies, or otherwise, as required by law.—Code, § 2196; *Fretwell v. McLemore*, 52 Ala. 124; *Jones v. Lightfoot*, 10 Ala. 17. The statute is imperative, and the decisions cited show the imperative necessity of a strict compliance with the law of presentation and verification. The claim, if claim it can be called, was filed by Ligon. And Moore could not become a party, in the manner shown by this record. The plea which the court struck from the files was a good defense, and if defective, it should have been demurred to, and not stricken from the files. It set up a defense which arose after the time for filing objections had elapsed, and so could not be pleaded within twelve months. The statute has no application to defenses arising after the lapse of twelve months.

J. B. MOORE, *contra*.—The plea was properly stricken from the files. No objection to the claim had been made within twelve months, and the statute is imperative that the claim must be allowed, unless the objection is filed within twelve months.—Revised Code, §§ 2202, 2203; 33 Ala. 457; 20 Ala. 772.

The statute declares what shall be a sufficient verification, and it was literally complied with in this case. The presentation of a copy or an abstract, or even notice given of the claim, with the assertion of the liability of the estate, and that he looked to the executor for payment, is sufficient.—2 Stew. 447; 1 Port. 359; 12 Ala. 193; 10 Ala. 17.

BRICKELL, C. J.—1. The motion to dismiss the appeal can not be entertained. It comes too late, after a submission of the cause on the merits, without notice of it to the appellant, and without affording him the opportunity of curing the defects by amendment, as he could have done under the statute.—Code of 1876, § 3931.

2. The statute requires that every claim against an insolvent estate, which is to share in the distribution of the assets, must within nine months after the declaration of insolvency, or after the claim accrues, be filed in the office of the judge of probate, verified by the oath of the claimant, or of some other person who knows its correctness, and that the same is due, or it is forever barred. If an executor, administrator, guardian, or trustee, is the claimant, the verification may be according to his belief. An insufficient verification may be corrected by amendment or proof, at any time before

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final decree.—Code of 1876, § 2568. Objections to the allowances of the claim, are required to be filed within twelve months after the declaration of insolvency, or they can not be entertained.—Code of 1876, §§ 2574–51.

The words of the statute would indicate that the *claim*, that which is asserted to be an existing liability on the estate, should be filed. The effect of the declaration of insolvency, is to draw within the jurisdiction of the court of probate, all claims against the estate, and all controversies as to their validity; and it is the manifest purpose of the statute, that on the files of the court of probate, at the expiration of nine months from the decree of insolvency, open to the inspection of the personal representative, and of all creditors, every claim entitled to share, or which it is claimed shall share in the distribution of the assets, shall be found. It is the duty of the personal representative, and the right of each creditor, to contest the allowance of any and every claim which shall be preferred, if believed invalid, and a full and fair opportunity for an examination and contest of the claims, the statute intends to afford. *Thames v. Herbert*, ante, p. 340. Such however has not been the construction the statute has received. Its purposes are regarded as accomplished, and its terms substantially complied with, when the evidence or statement of the claim as filed, taken in connection with the affidavit verifying it, disclose an existing liability against the estate. A copy of a promissory note, or of a bill of exchange, may be filed, the production of the original being dispensed with, unless objections are interposed to its allowance, and an issue as to its validity and justness formed.—*Rowdon v. Young*, 12 Ala. 234; *Rutherford v. Br. Bank Mobile*, 14 Ala. 92; *Flinn v. Shackelford*, 42 Ala. 202. A certificate of the clerk of a court in which a judgment had been rendered against the personal representative, substantially describing the judgment, has been declared a compliance with the statute. *Ransom v. Quarles*, 6 Ala. 437. In these, and in other decisions, it has been however declared that enough must appear from the claim, or evidence of it, which may be filed when taken in connection with the affidavit verifying it, to show an existing liability of the estate to the party asserting the claim.—*Cook v. Davis*, 12 Ala. 554; *Hogan v. Calvert*, 21 Ala. 298.

The receipt of the attorneys filed by Ligon, describes with particularity the three notes of the intestate, stating the date, the makers and payee, the amount, and time of pay-

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ment of each note, and that each bears interest from date. The affidavit refers to the receipt "for the claims or notes therein described for two thousand and eight 16-100 dollars, interest to be counted in favor of the estate of Isaac H. Walker, deceased, against the estate of Thomas E. Winston, deceased, is correct, and that the same is justly due and unpaid." Adhering to the decisions to which reference has been made, the receipt describing the notes, it must be declared there has been a substantial compliance with the statute; the affidavit fairly interpreted declaring the notes, not the receipt, is the demand preferred, and these *prima facie*, constituting an existing liability against the estate.

3. The allowance of a claim duly filed against an insolvent estate, is a right the statute secures to the creditor, unless objections directed to its merits, are filed within twelve months after the declaration of insolvency.—*McNeil v. Mason*, 20 Ala. 772; *Hardy v. Meachem*, 33 Ala. 457; *Thames v. Herbert*, *ante*, p. 340. In this last case it is said: "As to all matters of objection addressed to the validity or justness of the claim, which exist at the expiration of the period prescribed for filing objections, this is the effect of the statute." But if matters subsequently occur, which are a valid bar to the demand, or which deprive the creditor of all right in equity and good conscience to share in the distribution of the assets, the statute does not preclude their introduction, and they may be shown at any time before a final decree is rendered declaring the amount of the claim, and the rateable proportion of the assets to which the claimant is entitled. *Thames v. Herbert*, *ante*, p. 340.

4. The objection to the claims, in the form of a plea, presented by the appellant, was not filed within twelve months after the declaration of insolvency, and the matter of the objection existed when the claims were filed. This plea was stricken from the files on the motion of the appellee, and we think properly. The proper mode of objecting to pleading not filed within the time prescribed by the rules of the court, or by statute, is by motion to strike from the files. A demurrer would reach only defects apparent on the face of the plea, and would be an admission that it was properly filed. *Powers v. Bryant*, 7 Porter, 9; *Cobb v. Miller*, 9 Ala. 499; *Hart v. Turk*, 15 Ala. 675.

5. This objection having been stricken from the files, the remaining objections were directed only to the time of filing, and the verification of the claim. An insufficient verification is amendable at any time before final decree. The sub-

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sequent affidavit of Ligon contains much irrelevant matter, but if this was expunged, it identifies the notes, affirms their validity as claims against the intestate, and negatives their payment, curing whatever of defects may have existed in the original verification. There was no question of fact before the court, not triable by the record and files of the court, and it was not as matter of evidence the affidavit was introduced. It was simply an amendment of the original verification.

6. It is not until objections are interposed to the allowance of a claim, that the proceedings assume the form of a pending suit. When objections are interposed, "the court must cause an issue to be made up between the claimant and the administrator, or the contesting creditor, in the name of the administrator, in which issue the correctness of such claim must be tried as in an action of law against an administrator."—Code of 1876, § 2575. It has been said, it is proper practice for the creditor to declare, and the administrator to plead, as in an action at law.—*Ross v. Ross*, 20 Ala. 104. On all contracts, express or implied, for the payment of money, (other than bills of exchange and other negotiable paper), actions at law must be prosecuted in the name of the party beneficially interested, though he have not the legal title. The proceedings not assuming the form of a suit until objections to the claims are filed, when they do assume that form, it is proper that they should be conducted in the name of the party who if the proceedings were then being instituted in a court of law, would be the proper plaintiff. If the claim has been transferred, the contest should be conducted and the judgment rendered in the name of the transferee, if he have the beneficial interest, and the claim is not a bill of exchange, or other negotiable paper; and if that is the character of the paper, in the name of the party having the legal title. The judgment rendered will be conclusive on the party entitled to sue at law, and to receive the money, the ends of right and justice accomplished, and the uniformity of judicial proceedings preserved. If after the transfer, the proceedings should be conducted in the name of the original claimant, he would be a mere naked trustee, and the beneficial interest would reside in the transferee, apparently a stranger to the record. The policy of our statutes, in all actions upon contracts for paying money, is to introduce as the actor, the party beneficially interested, entitled to receive the money, or to release or discharge the contract. These claims having been transferred to the appellee, before objec-

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tion to their allowance were made, there was no error in permitting him to intervene and become the actor, when issues were formed as to their allowance. The case of *Miller v. Parker*, 47 Ala. 312, so far as it conflicts with these views, is overruled.

7. The jurisdiction of the court of probate over an estate as insolvent, can not be sustained on error, unless the report and decree of insolvency appear of record. The existence of these can not be presumed from recitals in the orders of the court.—*Clarke v. West*, 5 Ala. 117; *McLaughlin v. Nelms*, 9 Ala. 925; *McBroom v. McBroom*, 19 Ala. 173. Beyond recitals in the orders found in this record, there is no evidence of a report, or decree of insolvency, and so far as now appears, the whole proceedings, and the decree from which the appeal is taken, are *coram non judice*. This compels a reversal of the decree under the authority of former decisions.

When the judge of probate by reason of interest, or relationship, is incompetent to discharge any of the duties devolving upon him, the statute requires the register in chancery of the district, to discharge the duty as if he were judge of probate. When the register assumes the exercise of this jurisdiction, the record ought affirmatively to show the facts which authorize its exercise—bare recitals in orders made by him, is an irregular mode of disclosing it.—*Wilson v. Wilson*, 36 Ala. 655; *Hooke v. Barnett*, 38 Ala. 607. When the judge is a creditor, having a claim filed against an insolvent estate, it is not merely the contest of that claim, if any is made, of which the register must take jurisdiction, as this record indicates was the course pursued. The judge becomes incompetent as to the entire administration of the estate, and whatever of judicial duty is to be performed in reference to it, must be performed by the register. It is not necessary to examine critically the present record, with a view of ascertaining, whether it discloses the jurisdiction of the register. If the facts exist, the record should be made to conform to them.

Reversed and remanded.

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Bill of Review.

1. *Bill of review; when not maintainable.*—To justify relief on bill for review, under the rule settled by the decisions of this court, the record of

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the former suit, independent of the testimony, must satisfactorily and distinctly show that the court committed an error of law in the decree reviewed, arriving at an erroneous conclusion of law upon facts found by the record; erroneous inferences from the testimony, or error in denying it proper weight, and the like, are not matters for bill of review, and can be considered only on appeal.

2. *Same*.—Though the averments of the original bill authorize larger or different relief from that especially prayed, the error of not granting relief under the general prayer, can be reached only by appeal, and will not support a bill of review for error apparent.

3. *Settlement in Probate Court, when void*.—A settlement of an administration in the Probate Court, by an administrator who was at the same time administrator of deceased distributees, and guardian of other distributees, is a nullity; that court having no jurisdiction of a settlement in which the administrator occupies such different and antagonistic relations.

APPEAL from Montgomery Chancery Court.

Heard before H. A. HERBERT, Esq., as special chancellor.
The opinion states the case.

WATTS & SONS, and SAYRE & GRAVES, for appellant. When this bill of review is scanned, it will be seen that no error *on the face of the decree* is alleged. It is therefore clear that this bill is devoid of equity. The only errors alleged or complained of, are as to the *effect* of the evidence and the law arising thereon, in the original suit. You can not look to the *testimony* in the original suit, for error under a bill of review. For such errors, appeal is the only remedy.—*McDougald v. Dougherty*, 39 Ala. 409, and authorities there cited; *P. & M. Bank v. Dundas*, 10 Ala. 66; *Caller v. Shields*, 2 Stew. & Port. 417. Judged by the principles declared in these cases, the decree of the special chancellor was erroneous and should be reversed, and the bill here dismissed. The cases of *Cockrell v. Hays*, 41 Ala. and *Carswell v. Spencer*, 44 Ala. 204, have no application to this case.

ARRINGTON & GRAHAM, and R. M. WILLIAMSON, *contra*. It is insisted by appellants that any matter of error which could have been remedied on appeal can not furnish ground for a bill of review. To so hold, would be to eliminate bills of review from the chancery practice by judicial legislation in the face of the statute law of the State. We cite the language of the Supreme Court of Illinois, in *Evans v. Clement*, 14 Ill. 209, and which was quoted and adopted by our own Supreme Court in *McDougald v. Dougherty*, 39 Ala. 424, as expressive of the rule. "It has now become well settled that the court will, on such a bill, reverse or revise its own decree, for an erroneous application of the law to the facts found, *whenever a court of appeals would do so for the same*

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cause." In the same case, page 423, our court say, "that the relief for *error apparent* is not confined to accidental or inadvertent errors on which the chancellor does not appear to have exercised his judgment or reasoning powers, but may consist of error of law in the ordinary acceptation of that expression; such, for instance, as misjudging and misapplying the law to the facts stated—an erroneous and illogical conclusion from given premises." We think it will appear upon examination of the cases where bills of review have been dismissed on the ground that an appeal was the proper remedy, that there was a "misjudging of the facts" in the court below, or that the decree was entered by consent express or implied. In *Wadhams v. Gay*, 14 vol. Am. Law Reg. 426, the court say that "the decree appeared to be by consent, and that, therefore, a bill of review would not lie, on the familiar legal ground that there can be no error of law alleged against a judgment appearing to be entered by the consent of parties." The case of *Hallonquist v. Noble*, 53 Ala. 229, belongs to this class. In the case at bar there was, and could be no controversy as to the facts involving the liability of defendant to account.

That he was administrator of the several estates and guardian of complainants—that he had received a large amount of assets—and that he had made no settlement, except in the Probate Court, was admitted. The error obviously arose out of a misconception of the powers of the Probate Court, and the supposition that the settlement made therein were valid.

STONE, J.—The present case is a bill of review, filed to review and reverse a final decree rendered between the same parties, and to obtain the relief prayed in the original bill, on the alleged ground of error apparent. There was a demurrer filed to the bill of review, which the special chancellor overruled, and then granted the relief prayed for. The chief inquiry is, do the pleadings make a case of error apparent, under the rule settled in this State. To maintain a bill of review, there must be an error in point of law; that is, an erroneous result drawn by the court from the facts apparent on the record. It is not of a misjudging of the facts that a party can complain, but for an improper determination of the law. It is not permissible to look at the testimony, with a view of determining whether the chancellor scanned it properly, allowed it proper weight, or drew correct inferences from it. These are questions which arise on appeal,

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but not on bill of review. In the latter, the chancellor deals with record facts, not the evidence which goes to prove them. *McDougald v. Dougherty*, 39 Ala. 409. The court will, on such a bill, reverse or revise its own decree, for an erroneous application of the law to the facts found.—*Evans v. Clement*, 14 Ill. 209. To justify relief under such bill, the record of the former suit, independent of the testimony, must make it distinctly and satisfactorily appear, that the court, in the decree reviewed, committed an error of law, made an erroneous application of the law to the facts found, or mistook one name or thing for another name or thing. These constitute the error apparent, for which a bill of review will lie.

In the case of *Noble v. Hallonquist*, 53 Ala. 229, this court approved and adopted the doctrine laid down by the lord chancellor in the case of *Trulock v. Robey*, 15 Sim. 265. In each of those cases it was held that when a bill, in its averments, authorized larger relief than the chancellor granted, and the special prayer was for only the relief obtained, although there was a general prayer under which the larger relief might have been decreed, this might be the subject of an appeal, but would not support a bill of review. This court placed the complainant in a dilemma as follows: "The complainant on the original hearing, either asked this specific relief, and it was refused her, or she did not ask it, but accepted and was satisfied with the relief granted her by the decree pronounced. If she then asked it, and it was refused, her remedy for the error, if it be error, was by appeal. The error then would be merely in the judgment, and would not be the *error apparent* on the face of the decree, which supports a bill of review. If she did not then ask this relief, but accepted and was satisfied with the relief granted, it is too late for her now to complain."

The appellant, Tankersly, was, at one and the same time, administrator of the estate of George Pettis, the elder, of Theophilus Pettis and George Pettis, jr., distributees of the elder Pettis, who died after the death of their father, and was guardian of James and Mary Pettis, complainants in this suit. When George, the elder, died, his four children, named above, became his distributees, all being minors. Theophilus and George, jr., each died in their minority, and James and Mary became, in legal effect, sole distributees of the three estates; but, according to the forms of law, it was necessary first to settle the administration of the elder Pettis, to ascertain the amount that would pass in distribution to each of the living children, and to the personal representative of the

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deceased ones; and then to settle the administration of the two deceased children's estates, in order to know what sums would pass to the guardian of the living children. Tankersly being administrator of each estate, and guardian of the survivors, who were minors, must, of necessity, settle each administration, in one representative capacity, with himself in other representative capacities. And he must settle each administration, before the guardianship of the minors could be settled.

On the 31st of October, 1865, Tankersly, the administrator, filed his three several accounts current in the Probate Court, for final settlement of his administrations of George Pettis the elder, Theophilus Pettis, and George Pettis, jr. When these settlements took place is not shown or averred. On the 28th of November, 1865, he filed his accounts current for final settlement of his guardianship of the complainants, and at the same time tendered his resignation of his said guardianships. When this settlement took place is not averred, nor is it averred when he ceased to be guardian. There is nothing in the record from which we can learn what were the decrees in the final settlement of the said several administrations. It is averred in the bill that on the settlement of the guardianship, there was decreed to complainant, Mary Pettis, \$125.92, and to complainant James Pettis, \$51.74—and to each \$150 in Confederate treasury-notes, and \$900 in Confederate eight per cent. bonds. These sums, it seems, were paid by Tankersly into the Probate Court for the benefit of the wards, and were subsequently received by the succeeding guardian of complainants, who were then infants of tender years. The aggregate of the sums thus paid, including the Confederate treasury-notes and bonds, was near \$2,300. This, besides costs of administration and of settlements.

In 1866, the complainants in this suit filed their original bill against Tankersly, as administrator of each of the said estates, and as guardian of complainants, and against his sureties on each of the four said bonds, who were, in each case, to some extent, different. Mosely was surety on all the four bonds. Norman was surety on three of the bonds, not being on the bond for the younger George Pettis' estate. Carter was surety on the bond for Theophilus Pettis' estate, and on the bond for the guardianship of complainants. Pool was surety on the administration of the elder Pettis' estate, and Stewart was surety for the administration of the estate of George Pettis, jr. In the original bill it is charged that

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Tankersly, in his final settlement of the estate of Theophilus Pettis, "charged himself with balance due in good money, \$1,169.92," and in his settlement of George Pettis, jr.'s estate, with "balance due in good money, \$432.77." The original bill further charges "that previous to the 16th day of May, 1860, the said Tankersly had in his hands from the sale of the property already mentioned, and from other assets of the estate of their father, after payment of all the debts of said estate, the sum of four thousand nine hundred and nineteen 32-100 dollars, in specie, or funds equivalent thereto, which he used for his own benefit, lending the whole, or a large portion thereof, at usurious interest, without ever accounting for the usurious profits—or otherwise using it for his own benefit." The bill then charges that Tankersly, during the war, received other large sums of assets in Confederate money, with which he paid the expenses of his wards, and the costs and expenses of the settlement of the several estates—the whole not exceeding \$700; and with which Tankersly pretended to have purchased the \$1,800 Confederate bonds, as an investment for complainants. The said original bill contains an interrogatory, by which Tankersly was required to answer "whether he used the money belonging to the estate of George Pettis, sr., or either of the aforesaid estates of which he was administrator or guardian, for his own benefit during the years from 1858 to 1865, or any part of said money; and if any part, how much; and if for part of the time above specified, then how much of said time, and what year or years, or part or parts thereof. If he did not so use said money, then in whose hands was said money, or any part thereof, and for what purpose was it there, and at what time, and how long." The prayer for relief is, "that said settlements in the Probate Court be set aside, and that said Tankersly and his said sureties be compelled to account with and pay to your orators, or to some one in trust for them, as in equity and good conscience they ought, and for other or further relief." We have now stated every material averment of the original bill, which bears on the questions we propose to discuss. This bill dispensed with sworn answer from the defendants. The answers admit that Tankersly had the sum of money changed—\$4,919.32—at the time charged. Deny that he used any of the money for his own benefit—deny that he made more than lawful interest; allege that the Confederate money and bonds received by him, were received in good faith in payment for property sold, and for debts due, and that he fully accounted in said

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settlements for all the assets. A demurrer was appended to the answer, assigning many grounds, and among them multifariousness. The decree of the chancellor was rendered at the March term, 1868, and is in the following words: "This cause came on to be heard, and was submitted for decree at the last term on the pleadings and the testimony, and was held over for consideration until the present term. And now, on consideration, it is ordered, adjudged and decreed that the complainants' bill of complaint be dismissed, and that the next friend of complainants pay the costs of this suit, for which execution may issue."

In 1873, the complainants, being still minors, filed the present bill of review, for alleged error apparent. The bill of review sets forth a copy of the original bill and answer, the substance of the material parts of which is stated above. It also sets forth the decree of the chancellor copied above. It avers that in the original cause, "testimony was taken, consisting of a transcript from the records of the Probate Court of the settlements of said Felix M. Tankersly as administrator of G. W. Pettis, sr., Theophilus H. Pettis, George W. Pettis, jr., and as guardian of George W. Pettis, jr., and of your orators, and of the depositions of witnesses in reference to the point made in the bill, that said Tankersly had made usurious interest, which he had failed to account for." The error apparent complained of in this bill is, that "orators are aggrieved by said decree, and that they ought not to be bound thereby, nor should any such have been made; and that the same is erroneous, and ought not to be reversed. And for error, do, according to the course of this honorable court, assign the following: That it appears by the allegations of the bill and the admissions of the answer that said Tankersly, as the administrator of George W. Pettis, sr., received a large sum of money from sales made by him of the property of said estate, and that at the time of each and all of his settlements thereof in the Probate Court, he was administrator of the estate of Theophilus H. Pettis, administrator of the estate of George W. Pettis, jr., and guardian of your orators: that all of said settlements are null and void, as said court had no jurisdiction of said settlements, because he was the representative of conflicting interests. That in truth and in fact the said Tankersly has never made any settlement of said estates, and that your orators were entitled to an account of his administrations in said honorable court of chancery, which alone had jurisdiction thereof, as prayed for in said bill of complaint." The

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bill then avers that the estate of George Pettis, sr., is ready for settlement; that the estates of Theophilus Pettis and George Pettis, jr., owe no debts, and the only property belonging to their estates is their interest in their said father's estate. There was a demurrer to this bill of review, which the chancellor overruled, and granted the relief prayed for, as stated above.

Before Tankersly made his settlements as guardian, he must needs have settled his several administrations, for the complainants were the ultimate distributees of each of said three estates. When he settled the administration of George Pettis, the elder, he necessarily settled with himself as administrator of Theophilus Pettis, and of George Pettis, the younger; and when he settled the administration of Theophilus Pettis, he settled with himself as administrator of George Pettis, the younger. He could not, in the Probate Court, lawfully settle these administrations, by reason of the antagonist interests he represented.—*Hays v. Cockrell*, 41 Ala. 75; *Carswell v. Spencer*, 44 Ala. 204; *Foster v. Wilber*, 1 Paige, 537. Whether, the administration settlements being regular, he could, at the time these settlements were made, have lawfully settled with himself as guardian, we need not inquire. There has been enacted, since that time, a statute which authorizes such settlement, a special guardian for the infant ward being appointed to represent him. Pamph. Acts, 1875-6, 233; Code of 1876, § 2529. If this be a material question in this case, then the question whether Tankersly, at the time he made his administration settlements, was guardian of the complainants, is one on which the opposing counsel are not agreed.

According to the averments of the bill, admitted by the answer, he was such guardian when the accounts current were filed for the settlement of the administrations, and continued so for near a month afterwards. The record does not inform us when he ceased to be guardian. The undisputed averments of the bill show that the accounts current for the settlement of the three administrations were filed simultaneously on the 31st October, 1865, while the account current for the settlement of the guardianship, and offer to resign, bear date November 28th, 1865. We are not informed when any of these settlements were in fact made; but, as we have shown, there was a necessity that the administrations should be settled, before the guardianship account could be properly adjusted. We think, in the absence of denials in the answer, it is our duty to presume he remained guardian until after

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the settlement of the administrations. When anything continuous in its nature is shown to exist, its continuance will be presumed, until the contrary is shown.—1 Greenl. Ev. § 42; 1 Brick. Dig. §§ 32 *et seq.*

As we have shown above, the equity of this bill of review rests on the alleged error of the chancellor, in not decreeing that the Probate Court settlements were nullities, and in not forcing Tankersly to a settlement. This error, it is contended, is apparent on the record, or, what is the same thing, manifest in the pleadings and decree, without consulting the testimony. We have given above a copy of the chancellor's decree, and the substance of all that is said in the original bill and answer that bears on this question. We think the averments of that bill, the interrogatory to defendant, and the prayer for relief, all show that the primary, if not the sole purpose of that bill, was to compel Tankersly to account for the usurious interest, which it was averred he had realized, and had not accounted for, and to make him account for assets which the bill charged he had used for his own purposes. Hence, it is not charged in the bill that the Probate Court was without jurisdiction to make the settlements, nor that Tankersly sustained incompatible relations to the trust, which rendered a resort to chancery necessary. Nor is it shown by positive averment that Tankersly was guardian when he settled the administrations. All this is left to inference or presumption, arising from the averments of date when Tankersly filed his several accounts current for settlement. Nor is there anything in the prayer for relief, which directs the mind to this feature of the case. It is only the general prayer, which would authorize the court to treat the several trusts as never having been attempted to be settled, and to order and cover Tankersly to make settlements *de novo*. And the averments in the bill of review, as to the subject on which parol testimony was taken in the original cause, confirms our view that only the question of usurious interest realized and not accounted for, was pressed or considered in that case. This brings this case directly within the principle settled in *Noble v. Hallonquist*, *supra*, adopting the rule laid down by the Lord Chancellor in *Trulock v. Robey*, 15 Sim. 265.

It is not a matter of surprise that the principle settled in *Hayes v. Cockrell*, 41 Ala. 75, should have been overlooked, when the original bill in this cause was filed. That case was decided at the June term, 1867, while the original bill in this cause was filed near a year before. This may, to some

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extent, account for the omission from that bill of many averments, and from the prayer, of specifications, which doubtless would have been incorporated therein, had that bill sought relief on the ground that the settlements made in the Probate Court were nullities.

There are other grounds on which we think the present bill of review should have been dismissed, but we deem it unnecessary to comment on them. The decree of the chancellor is reversed, and a decree here rendered dismissing the bill of review.

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Action for Money had and received.

1. *Insurance; policy of, construed.*—A policy taken out by 'piano and music dealers, against loss by fire, describing the property as "*their own or held in trust,*" will, in the absence of evidence to the contrary, cover a piano left with them for sale or rent; but oral evidence is admissible to show what goods were intended to be, and were insured under the general words of the policy.

2. *Same; what evidence admissible to show contents of.*—In action against the insured for money had and received, by one who claimed that his goods were covered by the policies of insurance, the amount of which the insured had collected, secondary evidence may be given of the contents and terms of the policies, where they have been cancelled, and returned to the insurer in a foreign country.

3. *General exception; when unavailing.*—A general exception to the entire charge of the court, enunciating separable and distinct propositions of law, will be unavailing, if any one of its separate propositions is correct.

4. *Insurance money, right to share in; what does not forfeit.*—One who effected insurance covering his own and other goods stored with him, and collected the amount of the policy on the happening of the loss, can not defeat an action by the owner of such goods for his share of the insurance money, because such owner never requested any insurance and did not know that it was taken out until after the loss, and failed to ratify expressly, or otherwise, the acts of the warehouseman in taking out the policy, before the payment of the loss.

5. *Same.*—In such case the insured holds the amount collected as trustee for the owner of such goods as well as those held in his own right, and the failure to make proof of loss of the goods of other persons, the value of his own goods being more than the amount of the policy, which he collected in full, will not prejudice the rights of such persons; nor can he claim to have the loss of his own goods first made good out of the fund received, before owners of the other goods can share therein.

APPEAL from Circuit Court of Mobile.

Tried before Hon. HARRY T. TOULMIN.

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The appellee, Mary Carr, brought this action against the appellant, Snow, to recover the insurance on a piano she had placed with him for sale or rent, and which had been destroyed by fire while in his possession. The complaint, which was filed December 9th, 1875, alleged that Snow had policies of insurance which covered the piano in question, and that he had collected from the insurance companies the full amount of the policies, and had not paid plaintiff her share of said insurance.

On the trial, it was shown that in the year 1873, the appellant, Snow, and one Brown, were partners in the business of selling and renting pianos, and other musical instruments, on commission, and that during that year the plaintiff placed in their charge the piano in question, which she testified was her own property, and worth two hundred and fifty dollars, and that neither Snow nor his partner, had ever sold or rented said piano for her, or in any way accounted to her for it. She further testified that she had not instructed Snow or any one to insure the piano for her, or agreed to pay any premium therefor, and that she did not know at the time Snow's store was consumed by fire, that he had any insurance on his store or its contents. It was shown that her piano was in the store of appellant, and was destroyed by fire in August, 1874, and that before suit was brought she had demanded pay for her piano out of the insurance money, which had been refused.

J. H. Higley, a witness for the plaintiff, testified that he was the secretary of the Washington Fire and Marine Insurance Company, in which the appellant Snow and his partner had, under the name of Snow & Brown, effected insurance on the stock of goods in their store in the year 1873, which was renewed and in force in 1874, and at the time of the fire which destroyed the property of Snow in August of that year. This witness produced the policy in which the property insured was described as follows: "Their stock of pianos, organs, musical instruments, musical merchandise, &c., kept by them for sale, their own or held in trust, or sold, but not delivered, contained, or to be contained, in the two story brick, slate and tin roof, building, Nos. 102 and 104 Dauphin street." The proofs of loss prepared by Snow after the fire, was also put in evidence by the plaintiff, and Higley then testified that the insurance company had paid to Snow the full amount of said policy. These proofs of losses contained a list of property valued at twenty-three thousand and twenty 41-100 dollars. The plaintiff also introduced one H. J. Robb,

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who testified that he was the managing clerk in the office of the agency in Mobile of the London and Lancashire Insurance Company, and that Snow & Brown had in his company three policies of insurance, two for five thousand dollars each, and one for thirty-five hundred dollars, and that after the fire, and before this suit, the said insurance company had paid the losses on these policies to the appellant as the successor of Snow & Brown, cancelled said policies and returned them to the agents of the company in Mobile, who had returned them to the home office in Liverpool, England; that witness was the clerk of said agents, having had the custody of said policies, and well knew their contents. This witness was then asked by the plaintiff "whether or not said other policies were not similar to the policy already in evidence. The defendant objected to this oral proof of the contents of of said written papers, on the ground that they were not lost or destroyed, and that it was not shown that plaintiff had made any effort to get the policies, by taking the depositions of the custodian or otherwise." The court overruled the objection, and defendant excepted.

This witness then testified "that the policies in the London and Lancashire Company all described the property covered by them in the same language as that used in the Washington Fire and Marine Insurance Company's policy," set out in the testimony of Higley. Witness stated that he was certain of this, except as to the words "to be contained" where they occur in said description; as to these words, witness could not tell certainly, and thought they might have been omitted. This witness further testified that the London and Lancashire Insurance Company had settled with Snow by the same proofs of loss as the Washington Fire and Marine Insurance Company, and that on the second day of August, 1875, said company paid to Snow thirteen thousand nine hundred and fifty dollars, being the full amount of the policies held by him.

The defendant Snow testified that the plaintiff had never asked him to insure her piano, and that he had not included it in the proofs of loss which he rendered to the insurance companies, and had received no money therefor from the said insurance companies, but had received "all the money due and payable on the policies." This witness testified further that the value of his stock which was destroyed by said fire was a little over thirty-six thousand dollars, including about six or seven thousand dollars worth of consigned goods, belonging to persons in New York, as to which he

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was under a contract to keep insured; and that the value of his own property destroyed by the fire exceeded the amount of all the policies by over ten thousand dollars. This was substantially all the evidence. The court charged the jury, and the defendant "excepted to the charge."

The defendant then requested the following written charges, which were each refused, and he separately excepted: "1. If the jury believe from the evidence, that the piano claimed by the plaintiff was not included in the proof of loss of Snow against the insurance companies, in which his stock of goods was insured, and that he did not receive any money from said companies on account of said piano, then they must find for defendants. 2. If the jury believe from the evidence, that the piano of plaintiff was in the store of defendant at the time of the fire, subject to the order of the plaintiff or her agent, and that defendant had no interest in said piano, and received from the insurance companies no money on account of the loss of said piano, then they must find for the defendant. 3. If the jury believe from the evidence, that the piano of plaintiff was not included in the proof of loss of defendant exhibited to the insurance companies liable for the loss, and that he (defendant) received nothing from the companies for this piano, they must find for the defendant. 4. If the jury believe from the evidence, that the value of the goods in the store of the defendant, belonging to him at the time of the fire, was equal to or exceeded the amount of all the policies of insurance thereon, then the defendant had the right to pay himself for his own goods, from the money collected from the insurance companies, in preference to paying for goods held in trust or on commission. 5. Although the jury should believe from the evidence, that the plaintiff's piano was in the store of defendant in trust or on commission, and there was no agreement to insure and no custom of trade to insure property so situated, shown by the evidence, then they must find for the defendant, unless they further believe that the defendant received some money on account of the loss of said piano. 6. If the jury believe from the evidence that the plaintiff's piano was included in the policy, and the insurance was not adopted by the plaintiff prior to the payment of the loss, and the plaintiff knew of the loss at the time it occurred, then they must find for the defendant, unless they believe from the evidence that the defendant in point of fact received money from the insurance companies for said piano. 7. If the jury believe from the evidence that plaintiff did not instruct defendant to insure, and that it is no custom of

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trade to insure pianos left for sale, and that the plaintiff did not know of any insurance being effected on the stock of goods and pianos in the store of defendant, and that defendant did not include this piano in his proofs and claim of loss, and received no money therefor, and that his own goods and the goods he had agreed to keep insured exceeded the amount of his policies, then they must find for defendant. 8. That there could be no ratification or adoption of the policies by plaintiff after the payment and surrender of the policies by defendant. 9. That if they believe from the evidence, that plaintiff knew of the fire, and loss of the piano, and did not adopt and ratify the policies for about one year thereafter and not until the money had been paid and the policies surrendered, and that there was an unreasonable length of time and waiver of her right to share in the insurance money, if she had any, they must find for the defendant. 10. If the jury believe from the evidence, that the property of defendant exceeded in value the amount of the several policies of insurance, then he had the right to satisfy his own claim first, and if there was no balance left after this was done, the plaintiff can not recover, and they must find for the defendant. 11. If the jury believe from the evidence that the value of the goods destroyed in the said fire belonging to defendant, and covered by the policies, exceeded the amount of all the policies, and exceeded the amount defendant received from the insurance companies, then he had the right to retain the money for his own loss, and they must find for defendant."

The admission of the testimony, and the refusals to charge as requested, are now assigned for error.

BOYLES & OVERALL, for appellant.

STEPHENS CROOM, *contra*.

No briefs came into the Reporter's hands.

MANNING, J.—This case, like that of *Snow v. Stoutz*, decided at the last term, arose out of the destruction of plaintiff's piano, by the burning of the store of defendant Snow in August, 1874, the piano being then therein for sale or rent. Mr. Snow was a seller of musical instruments and other merchandize, his own, and on commission for others. The two cases presented several questions common to both; but those upon which the judgment of Stoutz against Snow, in the Circuit Court was reversed, do not arise upon this record.

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On the trial of that cause, upon objection made by plaintiff, evidence offered by defendant to show that he had not received from the insurers any money on account of the piano, and that it was not intended to be and was not insured under the general words in the policy, was erroneously excluded. And it is with reference to the facts so proposed to be proved as a part of the case, namely, that the piano was not insured, and that no money was received from the insurers on account of it, that the opinion in that case is to be understood. No such testimony was ruled out or objection made to it at the trial of the cause in hand.

The policies of insurance taken by and paid to Mr. Snow upon which both suits were brought, are the same. And in *Snow v. Stoutz*, two points that are presented in this case, were ruled in favor of appellee, Carr, namely: 1st, there was no error in receiving parol evidence of the contents of those policies which had been cancelled and returned to the company in England that issued them; and, 2d, the policies to Snow & Brown, of whom Snow was the successor, describing the goods insured as "their own or held in trust," by these latter general words, and in the absence of evidence to the contrary, embraced the piano of plaintiff. It was, however, further held that oral testimony on the part of Snow, was admissible to prove that those words were not intended to cover and therefore did not cover this piano, but related to other merchandize received from abroad, to be sold by him on commission, and which he was instructed to keep insured.—See, also, *Waters v. Assurance Co.*, 5 Ellis & Bl. 870, and *Lee v. Adsit*, 37 N. Y. 94, *et seq.* Upon these points there was no error in the rulings of the circuit judge in this instance.

Plaintiff testified that she had not instructed defendant to insure her piano, and said nothing about paying any premium for insurance; that she learned that her piano was destroyed by the fire of the 31st of August, 1874, and did not know or have any knowledge or information about the insurance until long after the fire. Defendant testified "that plaintiff had never asked him to insure her piano, and he had not included it in the *proofs of loss* which he rendered to the insurance companies, and had received no money therefor from said insurance companies, but *had received all the money due and payable on the policies.*" He said further that "the value of his own property destroyed in said fire, exceeded the amount of all the policies over \$10,000." The insurance money was paid to him—a part in May, 1875, and the residue and larger

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part in August of that year; and no demand for any part of this was made by plaintiff till after that time.

1. The general charge of the circuit judge to the jury was composed of special instructions, which obviously were not all erroneous. And the exception to that charge failing to designate any particular in which it was supposed to be wrong, does not, according to repeated decisions of this court, bring up any question for our determination. The legal propositions which we are to consider all arise upon the charges asked for defendant below and refused by the presiding judge. Without repeating them here, we proceed to consider the propositions founded upon them.

According to the bill of exceptions, it contains "substantially all the evidence" that was introduced. What Mr. Snow, when testifying for himself says, is, that he "was not asked to insure the piano, and had not included it in the proofs of loss." He did not say that it was not his purpose or understanding that the policies should protect the piano, or other like goods received as this was, in his store. Nor do any of the numerous charges asked on behalf of appellant, assume, even hypothetically, that the piano was not insured. And these charges if given would have required other explanatory ones on behalf of the plaintiff. No question founded upon the idea that the policies were not intended to and did not cover this instrument, is presented for us to decide.

The fact that plaintiff, Carr, did not request that her piano should be insured, does not prevent her from being entitled to the benefit of the insurance if effected. This was settled long ago by decisions made here and elsewhere—*Durand v. Thouron*, 1 Porter, 238; *Batre v. Durand*, id. 251; *Snow v. Stoutz*, *supra*; *Waters v. Assurance Co. supra*; *Siters v. Marrs*, 13 Penn. St. 218; *Home Insurance Co. v. Balt. Wareh.* 93 U. S. 543.

The value of the goods insured and burnt being much greater than the amount of insurance, it was not necessary in order to obtain the whole of this, to make proofs of all the goods destroyed. The omission, though, to do this, in such a case, can not hurt the plaintiff. According to the policies, Snow stood in the relation of a trustee for her: and he could not release himself from his responsibility as such, by failing to assert to others her right to a share of the money which he was demanding and receiving in full from the companies that owed it to him as trustee, as well as in his own right. They must be understood as paying, and he as accepting the fund as an indemnity, according to the policies, for the loss

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of the goods insured, those of others as well as his own. *Batre v. Durand*, 1 Porter, 255-6.

Was it, as supposed, necessary to entitle plaintiff to the benefit of these policies, that she should, before they were paid, have ratified the acts by which they were procured, or in any other manner have expressly signified her adoption of the policies? In *Batre v. Durand*, *supra*, this was done after the fire, though before payment of the loss: and the court held that sufficient. Whether any such ratification was essential or not, was a question not then presented. The answer to it must depend on the nature and facts of the case. It is easy to imagine circumstances which would make a ratification requisite. But persons engaged in a business by which large quantities of the goods of others pass into their possession and charge, and out again to others, soon afterwards, may find it to their advantage, to take out policies of insurance at their own expense, for the protection of such goods. Said Lord CAMPBELL: "It would be most inconvenient in business, if a wharfinger could not, at his own cost, keep up a floating policy for the benefit of all who might become his customers."—5 Ellis & Bl. *supra*, p. 881. The expense might be "much more than repaid by augmented business induced by the confidence which an insurance would inspire."—*Liter v. Marrs*, 13 Penn. St. 220. For aught that appears, it was with such views and in consideration of their custom, that Mr. Snow took out policies which protected the goods of those from whom he received them for sale on commission. And this being beneficial to plaintiff, and not imposing upon her any burden, her assent to it, like that of a creditor to an unconditional assignment for his benefit from his debtor, is to be presumed.

It is contended that defendant is entitled to have the loss of his *own property* by the fire of August, 1874, first made good out of the insurance money; and that plaintiff's right is limited to the residue only, if there be any. The contrary of this was decided by the Supreme Court of Pennsylvania in *Liter v. Marrs*, 13 Penn. St. 220. In regard to a similar policy, it was there held that it afforded to the *property* of the assured and that of his customers, "equal protection." "Its terms (says the opinion), place all the goods in the warehouse from time to time, on the same level; all are equally protected. A similar decision had been made in this State more than twenty-five years before in *Batre v. Durand*, *supra*. It was then held, of a policy like those taken by Mr. Snow: "That the sum at which the policy

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was valued may have been less than the value of all the articles consumed, does not destroy the right of any for whose benefit the insurance was effected, to his proportion of the proceeds."

In the Pennsylvania case cited, reference was made to a passage found in Story on Agency, § 111 (as now numbered), which seemed adverse to the views of the court. Speaking of agents, that learned jurist said: "If they insure in their own name only, they may in case of loss, recover the whole amount of the value of the property insured from the underwriters, and the surplus beyond *their own interest*, will be a resulting trust for the benefit of their principals." Of the authorities given for this passage, it is remarked in the opinion, that they "do not so much as allude in the slightest manner to what is supposed" to be its meaning; and no other authority for it was then known. It was, therefore, inferred that it was not correctly understood. Six years afterwards in *Waters v. Assurance Co.*, a suit of the assured against the insurer on a similar policy, Lord CAMPBELL, C. J., remarked of the assured: "They will be entitled to apply so much to cover their own *interest* and will be trustee for the owners as to the rest."—5 Ellis & Bl. 881. And in a like case of the assured against the insurer, (*Home Ins. Co. v. Balt. Warehouse Co.* 93 U. S. 543,) Mr. Justice STRONG, recently said: "It is undoubtedly the law that wharfingers, warehousemen and commission merchants, having goods in their possession, may insure them in their own names, and in case of loss, may recover the full amount of insurance for the satisfaction of their own *claims* first, and hold the residue for the owners."

But these learned lawyers did not mean thus to decide, in cases between parties in which the question could not arise, that when agents or bailees insured goods of their own and goods belonging to their customers, by policies like those in question, and received the entire amount stipulated to be paid in case of loss, they were entitled to payment in full for the loss of *their property* first, and that the others were to be paid only out of the residue. They do not speak of the property of the assured, but of their "interest" in or "claims" against the *property* of their principals, for storage, insurance, advances, commissions and other charges, to secure which they had a lien on the property, and were entitled to an extension of it to the insurance-money which they should receive in place of the property. This appears upon an examination of the passages themselves, and is made more

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apparent by a consideration of the cases and of the authorities referred to, in the opinions.

The rule for distributing among several, the proceeds of a security provided for them all in common, but insufficient for the payment of all in full, is—that *equality is equity*: And if one of them have a lien, by law or contract, thereon, for payment of the debt of another to him, the lien shall be discharged out of the debtor's share of the fund.

This disposes of, adversely to appellant, all the questions raised by his exceptions and assignments of error.

The judgment of the Circuit Court must be affirmed.

Brown, Adm'r, v. Tutwiler, Adm'r.

Revivor.

1. *Revivor; within what time must be made.*—Under our statutes, *revivor* in favor of or against the legal representative can not be made, if moved for after eighteen months from the occurrence of the event which renders it necessary; and the same rule applies where *revivor* is sought in the name of a succeeding administrator, or other successor in the right to sue or be sued, in place of one removed, as where *revivor* is made necessary by the death of a party.

2. *Same.*—The fact that the suit was brought by an administratrix, on a contract made with her as such, and that *revivor* was sought in the name of the succeeding administrator upon her removal, within eighteen months after it was made known to the court, though a longer period had elapsed since the removal was made, does not alter the rule. (MANNING, J., *dissenting*.)

APPEAL from Circuit Court of Hale.

Tried before Hon. GEO. H. CRAIG.

The opinion states the case.

W. M. BROOKS, for appellant.—The *revivor* was sought more than two years after the removal. This is not authorized. All the sections on this subject are in *pari matena*, and should be construed together.—*Pope v. Irby*, 57 Ala. 105.

THOS. SEAY, for appellee.—*Ex parte Jones*, 54 Ala. 180, is conclusive in our favor. *Pope v. Irby* is based on an entirely different state of facts from those here presented—the difference being fully shown in *Ex parte Jones*, *supra*.

STONE, J.—The present suit was commenced in 1866 in

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the name of Susan Hill as administratrix of C. W. Hill, deceased, and the cause of action declared on is a promissory note payable to Susan Hill, given in consideration of personal property of the estate of C. W. Hill, deceased, purchased by one of the makers of the note "at a sale of the personal property of said estate made by plaintiff [Susan Hill], as administratrix" thereof. The case was tried, and a verdict and judgment rendered for defendants in the year 1871. An appeal was prosecuted to this court, and in January, 1875, the judgment of the Circuit Court was reversed and the cause remanded.—*Hill v. Huckabee*, 52 Ala. 155. At the spring term of the Circuit Court, 1875, the defendants filed one or more pleas to the merits in bar, and the cause was marked "continued by operation of law" At the fall term, 1875, no entry in the cause appears to have been made. In March, 1874, Mrs. Susan Hill was, by order of the Probate Court in which the administration was pending, removed from the trust of administratrix, ordered to make settlement, but no administrator *de bonis non* was appointed, until the 17th day of October, 1876, when P. A. Tutwiler was appointed administrator *de bonis non*. Up to this time the suit had stood on the docket in the name of Susan Hill, as administratrix of C. W. Hill, plaintiff. At the spring term, 1876, the defendants filed a sworn plea, averring the removal of Mrs. Hill as administratrix, and the time of it, March 11th, 1874, in bar or abatement of her right further to maintain the suit; and at the fall term, 1876, a more elaborate plea, having the same object, was interposed by them, but not sworn to. We will not consider these pleas, nor the rulings on them, for we consider these immaterial questions.

On the 17th of October, 1876, two and a half years after Mrs. Hill was removed from the administration, and immediately after Mr. Tutwiler was appointed administrator *de bonis non*, it was moved that he, as such administrator, be substituted for Mrs. Hill as plaintiff. This motion was resisted by defendants; the motion granted, and defendants excepted. The foregoing are all the material facts that bear on the question presented.

In *Harbin v. Levi*, 6 Ala. 399, 403, Levi had been removed from the administration before the suit was brought. The cause of action, like that in the present record, was a note payable to the administrator for property sold by him as administrator. This court said: "We think it is clear that immediately on removal of Levi from the administration, his right over any of the assets of the estate ceased, and that

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it made no difference whether these assets existed in the shape of debts due to the intestate, or due by contract to the administrator." And in *Salter v. Cain*, 7 Ala. 478, it was said that an administrator who had recovered judgment in his representative capacity, could not, after removal from the trust, rightly sue out execution in his own name to enforce its collection. To the same effect are *Gayle v. Elliott*, 10 Ala. 264, and *Dunham v. Grant*, 12 Ala. 105. The case of *Tomkies v. Reynolds*, 17 Ala. 109, rests on peculiar, exceptional facts, and does not conflict with the cases above cited. *Hatch v. Cook*, 9 Por. 177, is an authority for substituting a party in place of one deceased, resigned or removed, on motion.

In *Pope v. Irby*, 57 Ala. 105, we considered section 2908 of the Code of 1876, which reads as follows: "No action abates by the death or other disability of the plaintiff or defendant, if the cause of action survive or continue; but the same must, on motion, within eighteen months thereafter, be revived in the name of or against the legal representative of the deceased, his successor, or party in interest." In that case the plaintiff, who was suing in his own right, died, and more than eighteen months elapsed before motion was made to revive in the name of the personal representative. Under the statute above, we ruled that the motion came too late. The statute provides alike for the cessation of the party's capacity to sue or be sued, whether caused by death or other disability. In either event, the suit "must, on motion within eighteen months thereafter, be revived in the name of, or against the legal representative of the deceased, his successor or party in interest." In the case of *Pope v. Irby*, *supra*, we said, "The statute authorizing the revivor of pending suits, and preventing their abatement because of the death or other intervening disability of plaintiff or defendant limits the right of revivor to eighteen months from the occurrence of the event which renders it necessary to revive." And the statute, section 2908, makes the same provision for revivor for and against a "successor or party in interest," as it does in reference to the legal representative. Having ruled that the revivor in favor of, or against the legal representative, can not be made, if moved for after eighteen months from the occurrence of the event which renders it necessary, we feel bound to make the same ruling as to a succeeding administrator, or other successor in the right to sue or be sued. We hold that section 2622 of the Code of 1876 must be construed in connection with section 2908, and that

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the former only renders more definite the word successor in the latter, without rendering its mandatory provisions less inoperative.—See, also, *Waller v. Nelson*, 48 Ala. 531. The case of *Ex parte Jones*, 54 Ala. 108, stands on facts different from those presented by this record. Whether the second head-note in that case is reconcilable with the views above expressed we do not propose now to consider. The revivor allowed in this case was improper, and the same is set aside.

The judgment of the Circuit Court is reversed, and the cause remanded.

MANNING, J., (*dissenting*).—The statute on which the question in this case depends, is as follows: “No action abates by the death or other disability of the plaintiff or defendant, if the cause of action survive or continue; but the same must, on motion within eighteen months thereafter, be revived in the name of or against the legal representative of the deceased, his successor or party in interest.”—§ 2908 (2542) of the Code of 1876. This was evidently enacted for the remedial purpose of intercepting and delaying—not of hastening—the abatement of suits; an object that should be kept in mind when construing the act. Under this idea, we took notice in *Ex parte Jones*, 54 Ala. 108, of the different state, according to the common law, of an action in which the plaintiff died, and of an action in which the plaintiff suing as an executor or administrator, had ceased to be such, but was still living. In the former instance, the action would abate by the mere death of the plaintiff, and a judgment afterwards rendered in it would be wholly void; while in the latter case, the suit would not abate, nor would a judgment rendered in it be void. The plaintiff living would keep the action alive, and he might prosecute it to a judgment in a suit, like the present, on a note payable to him as administrator, unless his removal from the office which entitled him to maintain it, was pleaded and shown. We consequently held in that case, in which the plaintiff, an administrator, had been removed, that when that fact was more than eighteen months afterwards brought to the attention of the court, the motion made at the same term to substitute his successor for him as plaintiff, ought to have been granted.

The statute being remedial, and its application tending to save costs, I think the decision made in that case ought to be adhered to, and that in the present case the judgment of revivor in the Circuit Court ought to be affirmed.

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Memphis and Charleston Railroad Co. v. Copeland, Adm'rx.

Action for killing of Intestate by Railroad Train.

1. *Contributory negligence; doctrine of discussed.*—The doctrine that one who has contributed proximately to the injury can not recover damages therefor, is now too firmly rooted in our jurisprudence to be open to further controversy; it rests not on the idea that one wrong sets off the other, or that one justifies the other, but on the broader ground, that when the negligence of the plaintiff has contributed proximately to the injury, the damage is considered of his own causing, and it is difficult, if not impossible, to determine the *quantum* of injury which resulted from the defendant's tortious or negligent conduct.

2. *Cases cited, and reaffirmed.*—The court reaffirms the principles declared in *Savannah and Memphis Railroad Co. v. Shearer*, 58 Ala. 672; *Tanner v. Louisville and Nashville Railroad Co.*, 60 Ala. 621; *Mobile and Montgomery Railroad Co. v. Blakely*, 59 Ala. 471.

3. *Negligence; what fixes charge of, on railroad company.*—The failure to ring the bell or blow the whistle on the starting of the train, as required by the statute, fixes the charge of negligence on a railroad company; and any one injured thereby may recover damages for the injury, unless his own negligence or fault has disabled him from making complaint.

4. *Contributory negligence; what will defeat recovery.*—Plaintiff's intestate got off a passenger train of defendant, which had just arrived in a small incorporated town, and attempted to crawl between two cars of a freight train standing on a side track, with locomotive attached and steam up, ready to start, which stood between him and the depot. Those in charge of the freight train did not see him, and backed it without giving proper signals, just as he got between the cars,—*held*: The conduct of the deceased can not be classed less than negligence, bordering on recklessness, and contributed proximately to his death, and his personal representative can not recover, though defendant was negligent in not giving proper signals before its train started—the injury not having been inflicted wantonly or intentionally.

APPEAL from Lawrence Circuit Court.

Tried before Hon. W. B. WOOD.

This was an action brought by the appellee Lizzie Copeland, as the administratrix of Alexander Copeland, against the appellant, the Memphis and Charleston Railroad Company, to recover damages for the killing of her intestate by the cars of appellant.

The undisputed evidence discloses these facts: On the 31st day of January, 1877, Alexander Copeland, the intestate of plaintiff, came as a passenger on the regular passenger train of appellants, from Decatur, Alabama, to Town Creek, Alabama, which is an incorporated town and a regular station of appellants. The depot at Town Creek is on the south

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side of the railroad, and there is a side track between the main line and the depot. It is necessary for passengers to cross said side track in getting from the cars to the depot. It was shown that there were two crossings for passengers to go to and from the cars to the depot; one east and the other west of the depot, where a public road known as the Green's Bluff road crossed the railroad. Copeland, the deceased, resided on the south side of the depot, about two hundred yards distant therefrom. At the time the passenger train on which Copeland was a passenger arrived, there was a long freight train, with locomotive attached and steam up, standing on the side track, (waiting for the passenger train to pass,) between the main line and the depot, which completely blocked up the crossings above referred to. Copeland waited about five minutes for the freight train to move, then tried to crawl between the cars of the freight train, and the cars being suddenly backed, he was crushed and killed. There was conflict in the evidence as to whether the whistle was blown or the bell rung before the freight train started; the witnesses for the plaintiff, three in number, testifying that no signal of any kind was given, and the witnesses for the appellant, who were the engineer, fireman and conductor of the freight train, testifying that both these signals had been given. The charge of the court was required to be in writing, and contained, among other things, the following paragraph, to the giving of which the appellant duly excepted: "Or if you believe from the evidence that the freight train was standing still when the deceased got off the passenger train, and that the freight train was between the deceased and the depot, and that it blocked up the crossings, so that the deceased could not cross, and that he was attempting to cross between the cars, and that the train started without giving the signal by blowing the whistle or ringing the bell, or by warning him to get away, then the plaintiff is entitled to recover such damages as the jury may think [proper] under the circumstances according to the evidence." The appellant then requested separately the following written charges, which the court refused, and to which refusal the appellant excepted: "4. If the jury believe from the evidence, that at the time of the accident, defendant's freight train was standing on its track ready and about to move, and that Copeland wishing to go to the other side of it, got between the cars of the train for any purpose, and not being seen by those in charge of the train, it was backed and Copeland run over and killed, then the jury must find for the defendant. 10.

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If the jury believe the evidence, they will find for defendant." The jury found a verdict in favor of the plaintiff, and assessed her damages at twenty-five thousand dollars, and the railroad company brings the case here by appeal.

The charge given, and the refusals to charge as requested, are now assigned, among other things, for error.

HUMES & GORDON, WILLIAM COOPER, T. K. POSTON, and JOSEPH WHEELER, for appellant.—The evidence in this case clearly established the contributory negligence of Copeland, and that his death was the proximate result of his own reckless, careless conduct, and this being established, the defense of contributory negligence is complete, unless the plaintiff could show that the injury was wantonly, recklessly or intentionally done by the defendant.—See *Tanner v. Louisville and Nashville Railroad Co.*, 60 Ala. 621; *Savannah and Memphis Railroad v. Shearer*, 58 Ala. 672; *Government St. Railroad v. Hanlon*, 53 Ala. 70.

Under the rules laid down in these cases, the evidence discloses only a catastrophe unattended with any blame which could render the company liable. These principles are amply sustained by authorities from other States.—See 25 Mich. 290; 35 Mich. 469; 10 Allen, 532; 39 N. Y. 61; 18 N. Y. 422; 13 Ill. 548; 62 Ill. 326; 10 Kansas, 426; 29 Iowa, 55; 33 Ind. 335; 5 Otto, 697; *ib.* 439.

J. B. MOORE, D. P. LEWIS, JAS. JACKSON, GEO. TAYLOR, and JAS. S. CLARK, *contra*.—The doctrine of contributory negligence has no application when, by the arrangements of the railroad, it was made necessary to cross between the cars. See *Kline v. Jewell*, 26 N. J. Eq. 474. The blocking up of the crossings was on the part of the defendant unauthorized and illegal.—*Ranch v. Loyd*, 31 Pa. 358. The negligence of the deceased, if any existed, was caused by the act of defendant, and the plaintiff is entitled to recover.—1 Sand. 89; 17 Ill. 406; 24 Ga. 356; 13 Peters, 181; 22 Wall. 341. The evidence as passed on by the jury, shows clearly that no signals were given. The failure to give these signals fixes conclusively the charge of negligence on the railroad company.—Code of 1876, § 1700; 48 Cal. 409; 10 Kansas, 426; 62 N. Y. 180; 22 Ill. 264.

STONE, J.—The doctrine, that one who has contributed proximately to the injury, can not recover damages therefor,

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is too firmly rooted in our jurisprudence to be open to further controversy. This principle does not rest on the idea that one wrong sets off the other, or that one justifies the other. It is founded on the broader ground, that when the negligence of the plaintiff has contributed proximately to the injury, the damage is considered of his own producing, and it is difficult, if not impossible to determine the *quantum* of injury which resulted from the defendant's tortious, or negligent conduct. It is not that, in such case, the defendant has done no wrong. His dereliction of duty may be so patent, as to render it morally certain that, without such dereliction, the injury would not have resulted. This is not the test; for it is equally true, in cases of proximate contributory negligence, that without the plaintiff's fault, the injury would not have resulted. To allow such plaintiff to recover, would be to permit a recovery for the proximate consequences of the plaintiff's own negligence.—*Tanner v. Louisville and Nashville Railroad Co.* 60 Ala. 621. And courts of common law can not institute a comparison of the degrees of negligence between plaintiff and defendant. *South and North Ala. R.R. v. Sullivan*, 59 Ala. 272. We have so fully discussed these questions in the cases cited, that we consider any further discussion unnecessary.—See, also, *Savannah and Memphis R. R. Co. v. Shearer*, 58 Ala. 672; and *M. & M. Railway Co. v. Blakely*, 59 Ala. 471.

The plaintiff's intestate was crushed and killed by a freight train of the defendant. The witnesses are not agreed on the question, whether the whistle was sounded, or the bell rung, before the defendant's train was moved. The charge of the court submitted that question to the jury, and, to find the verdict they did, if they regarded the charge of the court, it was necessary for them to find that neither of these signals was given. We must then deal with the case as if neither was given. Failing to sound the whistle, or ring the bell, was a breach of duty enjoined by statute, and fixes the charge of negligence on the railroad corporation; and any one injured thereby may recover damages for the injury, unless by his own negligence or fault he has disabled himself from making complaint. The undisputed facts are, that plaintiff's intestate attempted to cross defendant's railroad track, by passing under the coupling of two box-cars, which were coupled together, and constituted part of a train, then standing temporarily on the side-track; placed there, with locomotive and steam up, to allow a passenger train to pass it. While in the act of passing under the coupling, the train

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was moved, and he was knocked down, run over and killed. The attempt thus to pass between the cars of a train, which he must have known was liable to be moved, can not be classed as less than negligence. It borders on recklessness. It certainly contributed—proximately contributed—to the very sad disaster which followed. If the usual signal had been sounded, probably intestate could have extricated himself in time to save his life. If he had not attempted to cross over between the cars, he would have been in no peril, and would have suffered no injury. Both were in fault. The recent case of *Stillron v. Han. & St. Jo. R. R.*, published in Central Law Journal of August 9th, 1878, is not distinguishable from this in principle. In that case, two freight trains were on the side-track, their rear cars being in about twenty inches of each other. They blocked up the main street of the village, which contained about one hundred and fifty inhabitants. The father of plaintiff had passed through this opening, and returning a few moments afterwards in company with his little daughter, as they “approached within five or six feet of the opening, in answer to an inquiry from the daughter as to how he got through, the father pointed out the opening, and in his immediate view the daughter proceeded to follow his directions in passing through the opening, and was injured by the cars going together; the cars being moved by an engine that was about starting one of the trains from the side-track. This opening was a few feet east of the east line of a street-crossing. One of the trains entirely blocked up the street, and it was not shown that the men in charge of the train knew that any one was attempting to pass through the opening. The suit was by the daughter to recover for the injuries she had sustained. It was held that the accident occurred at a point where the train-men had a right to presume no one would attempt to cross; and, that where persons attempt to cross a railway at an accidental opening between cars, not in a highway, nor so placed as to invite the belief that it was left open for persons to pass through, they do so at their own peril. That the obligations, rights, and duties of railroad companies, and travellers crossing them, are mutual and reciprocal, and no greater degree of care is required of one than the other. The judge, in delivering the opinion of the court, said: “The injury which this suit sought to redress, to a bright little girl of eight or nine years of age, remarkably sprightly and attractive, the pet of her father and of the entire village where they lived, is calculated to excite the

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sympathy of jurors and judges. But in the administration of law, considerations of this sort must be discarded, and the case must be investigated and determined upon established legal principles, applicable alike to all." One principle of the case last cited is not in harmony with our decision in *Government Street Railroad v. Hanlon*, 53 Ala. 70. We allude to the ruling by which the infant was made to account for the negligence of its father. With that exception, we fully approve what is there decided, and hold that the principles are applicable to the present case.

That portion of the general charge which was excepted to is not in harmony with these views, and should not have been given. The fourth and tenth written charges asked should have been given.

Reversed and remanded.

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Petition for Mandamus.

1. *Mandamus; when does not lie.*—*Mandamus* is not the proper remedy, to compel a court or magistrate to discharge a person, alleged to be improperly detained under process issued by such court or magistrate.

2. *Discharge; when prisoner not entitled to.*—When a demurrer is sustained to an indictment, or it is quashed or otherwise vacated, the discharge of the prisoner does not necessarily follow; but the court in the exercise of the authority which inheres in it, without the aid of statutes, may, if it deem it proper, hold the accused to answer a new indictment, without hearing testimony, or calling witnesses to show his guilt.

PETITION for *mandamus*.

Graves and others presented their petition for *habeas corpus* to the presiding judge of the City Court of Montgomery in term time, and during the February term, 1879, alleging that they were illegally restrained of their liberty by the sheriff of Montgomery county, without due process of law, &c.

The petitioners averred that "they were prosecuted before the grand jury of said county at the February term, 1879, and bills of indictment found against them, which were quashed by your honor at the same term; that they then moved the court to be discharged, which motion was overruled, and the court further ordering that they be held over

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to await any indictment that might be preferred against them at a subsequent term of said court."

The judge endorsed on the petition the following refusal to grant the writ: "I refuse to grant the writ of *habeas corpus* in this case, because it is judicially known to me, that the grand jury at the spring term, 1879, of the City Court of Montgomery, found two indictments against these petitioners for burglary in railroad cars. One of these indictments was demurred to, by said defendants at said term, after the grand jury was discharged. The demurrer was sustained, and defendants, by order of the court in due form entered on the minutes of the court, by my order as judge of said court, were held over to answer a new indictment, and bond for their appearance fixed at \$250 each. The other indictment being lost or mislaid, the same order was made and entered upon the minutes of said court, all of which is a part of the records of said court, and in due form; in default of said bonds, they were remanded to jail, and the sheriff authorized to take such bonds in vacation."

The records of the court showed that orders had been made in the case as stated in the endorsement of the judge refusing to grant the writ.

The petitioners duly excepted to the refusal to grant the writ, and now petition this court for *mandamus* to compel the court below, or the presiding judge, Hon. John A. Minnis, to discharge them.

G. W. TOWNSEND, for petitioners.—The only question in this case is, whether the court had authority under the statutes, or under its inherent power, to hold defendants to bail, after the indictment against them had been quashed, lost or destroyed. The only statute laws bearing on the subject, are sections 4117, 4119 of the Code. The first section referred to is as follows:

"If defendant will not consent to such amendment, the prosecution may be dismissed at any time before the jury retire, as to the count in the indictment to which the variance applies; and the court may order another indictment preferred, at the same or a subsequent term in which case an entry of record must be made, to the effect following: 'The State v. A. B. In this, it appeared from the evidence that there was a variance between the allegation of the indictment and the proof, in this (setting out the variance), or it appeared from the evidence that the defendant's name was ——— (stating it), and the defendant refusing to allow

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the indictment to be amended, the prosecution *was dismissed* before the jury retired, and another indictment was ordered to be preferred.’”

In the very form of *entry* of the *order* of the court, is found the expression “*the prosecution was dismissed.*” If *dismissed*, there is no prosecution pending. If no prosecution be pending, the prisoner can not be *detained*.

“No person shall be accused, arrested, or *detained*, except in cases ascertained by law, and according to the *forms* which the same has prescribed.—§ 11, Bill of Rights.

Prisoners insist that they are “*detained*” not according to the “*form*” prescribed by these statutes, but against their spirit and letter.

If these enactments with their prescribed forms, mean anything, they mean that *by order of the court the prosecution has been dismissed, to be renewed upon a future contingency that may or may not happen, to-wit: the finding of “another indictment.”* In the interval, the prisoner is entitled to his freedom.

The law-giver never intended that a prisoner should suffer from the mistakes or ignorance of prosecuting attorneys in permitting fatal defects to creep into their indictments, nor from the carelessness of the officers in permitting the indictments to be lost, mislaid, or destroyed. The law means just what it says, that the prosecution should be “*dismissed*,” and the prisoner restored to his liberty—until the grand jury, in its sovereign discretion, might see fit to find “*another indictment.*” The moment this prosecution was dismissed, the hand of the law was withdrawn, and none other than trespassing hands can claim the prisoner’s further detention.

It will be contended that the court had inherent power to hold on to the prisoners after the indictments were lost, mislaid, or destroyed, or quashed, until “another indictment” was preferred. We deny the proposition.

It was decided in *Gannaway v. The State*, 22 Ala. —, that the courts had not inherent power to substitute an indictment which had been lost before arraignment and trial.

It was decided in the case of *Bradford v. The State*, 54 Ala., that the courts have no power to substitute indictments, when lost, mislaid, or destroyed before the defendant pleads.

If the courts have no inherent power to substitute a process by which the prisoner can be held and tried, then it necessarily follows that without such process the court had no inherent power to hold and try the prisoner.

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Certainly, the holding and trying or either without process at all, would be doing greater violence to the rights of the defendants, than the substituting a lost process he had not plead to. It would require greater power to do the former than the latter; and as stated, it has been expressly decided the latter can not be done.

But we are told, that it has been the *practice* in the State always to hold the prisoner when indictments have been quashed, lost, mislaid or destroyed.

That may be, and yet a bad practice should never, and can never become good law. Especially a practice which involves the *liberty* of the citizen. It should never be invoked to bridge over the errors and carelessness of officers, and positive defects in the law.

In the strong and wholesome language of the Chief-Justice in the case of *Bradford v. The State*: "It is far better the accused should escape, whatever may be the degree of his guilt, than that the courts by mere decision should introduce new rules to cure a defect in the law the particular case develops."

In the absence of such law, the court has no power inherent, or otherwise, to commit, and without hearing evidence as it did in this case.

H. C. TOMPKINS, Attorney-General, *contra*.—The case of *Gooden v. The State*, 35 Ala. 430, is conclusive against the petitioners.

MANNING, J.—The argument for petitioners presents their case with skillful ingenuity. But we think *mandamus* is not the proper remedy, if they were entitled to any.

"The judges of the circuit courts within their respective circuits, and the judges of inferior courts within their respective jurisdictions," are "conservators of the peace." Const. art. 4, § 16, Code of 1876, p. 140. And here, as in England, judges who are entrusted with the conservation of the peace are authorized to issue warrants of arrest, or to commit persons already before them, when the occasion for the commitment judicially appears.—1 Hale's P. C. 578; 1 Bish. Crim. Pro. (Ed. of 1872) § 229. Nor is it necessary that there should be any such legislation as that suggested by counsel, to confer on the courts having jurisdiction of crimes, in which those judges preside, the authority they have as judges. Said MARSHALL, C. J., in the trial of Aaron Burr: "It is believed to be a correct position that the power to

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commit for offenses of which it has cognizance, is exercised by every court of criminal jurisdiction, and that courts as well as individual magistrates are conservators of the peace. Were it otherwise, the consequence would only be, that it would become the duty of the judge to descend from the bench, and in his character as an individual magistrate, to do all that the court is asked to do."—Note to § 229, *supra*. But, in committing an accused person to jail, or in requiring bail for his appearance to answer to a charge of crime, the judge or the court doing so, acts judicially; and the correctness or not of the order or judgment rendered, can not be inquired into by the writ of *mandamus*. That is granted only when there is a clear legal right and no other adequate remedy. Ordinarily, in cases like the present, the investigation is had upon *habeas corpus*. The writ of *mandamus* is never issued to correct errors in, or to reverse the judicial action of a court. By that process "inferior courts or magistrates, when they fail or refuse to do so, will be compelled to entertain and exercise jurisdiction. They will not be controlled in the manner of its exercise, nor directed as to what judgment they shall render."—*Davidson v. Washburn*, 56 Ala. 597. The case of petitioners is, therefore, not a proper one for the writ of *mandamus*.

But the argument in their behalf is entitled to a further answer.

We can not assent to the proposition, that whenever a demurrer is sustained to an indictment, or it is quashed or otherwise vacated, the person against whom it was preferred is, in every such case, to be discharged. The presentment of a grand jury is always sufficient authority for the issue of a *capias* or warrant of arrest for the person accused, and for detaining him in custody, if not enlarged upon bail, to answer for the offense charged. The law, upon such a finding of the grand jury, makes it the duty of a court to hold him for trial upon the indictment. Now, if on account of an error in the name of a person mentioned in it—say of the owner of the railroad car alleged in this instance to have been burglariously entered, or for some other mere informality or defect not reaching the merits, the indictment be quashed or a *nol. pros.* entered,—must therefore, the court or judge, though knowing that nothing has been disclosed to show that the presentment of the grand jury is unfounded, yet discharge the persons accused and let them go free? This would be giving too much weight to that circumstance. When the indictment is quashed for a reason not touching the question

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of their guilt or innocence, they can not be considered as vindicated; nor is the effect of the presentment of the grand jury so destroyed, that, looking both to the safety of the public and the rights of individuals, it would be unjust to hold persons so accused of crime, bound to appear to answer another indictment therefor, free from the defects of the first. This is implied, indeed, by the provision of the statute, that the court may in such a case "order another indictment to be preferred for the offense charged or intended to be charged," either "at the same or a subsequent term." The authority to refer the matter again to a grand jury, imports that although the instrument quashed be vacated as an indictment, it may be good as an affidavit or report of the grand jury that the party accused had committed the offense with which he is charged. By declaring the power in a court to require inquisition by another grand jury, the statute recognizes it as possessing the corresponding authority of holding the supposed culprit to answer to their presentment.

If this were not so—if, as counsel contend, the accused were entitled to be set at liberty upon the quashing of the indictment for informality—this right would exist as well in a case transferred for trial by a change of *venue* to a different county from that in which the offense was committed and the witnesses lived, as in the latter; so that by having an indictment vacated at a time when witnesses could not be immediately produced, counsel might get the worst criminals turned loose to escape unpunished.

Gooden v. The State, 35 Ala. 430, arose out of such a case. One Foley was tried and found guilty, in Talladega county, of a crime committed in Randolph. But judgment was arrested for defects in the indictment, and a *nol. pros.* entered. Whereupon the court bound the accused by recognizance with sureties for his appearance to answer another indictment, to be preferred against him for the same offense, at the next term of the Circuit Court of Randolph county. Foley having failed thus to appear, his sureties, Gooden and others against whom a judgment of forfeiture was taken, denied the power of the court to exact the recognizance. It is true there was a verdict against the accused of a petit jury, as well as the presentment of a grand jury. But the former was annulled as completely as the latter was. This court upon an appeal to it said: "Independent of statute, the circuit courts possess the undoubted power, where the judgment in a criminal cause is arrested and a *nolle prosequi* is entered by the State, to bind the defendant over to appear at the

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circuit court of the proper county to answer a new indictment for the same offense,"—page 433. We think these petitioners were not detained in a case not provided for by law.

The writ of *mandamus* is refused.

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Action on Promissory Note.

1. *Waiver of exemption, plea as to; what not demurrable.*—Our statute (Code, § 2849) contemplates that in suits on written instruments in which exemptions are waived, the fact of such waiver shall be averred, and gives the defendant, not controverting the existence of the debt, the right to limit his contestation to the fact of such waiver; and the statute giving the right, such a plea is not demurrable, because it does not answer the whole declaration; the consequence of the plea if sustained, is not to deprive the plaintiff of judgment for his debt and cost, but only to prevent the insertion in the judgment of the recital of waiver which would authorize a levy on exempt property.

2. *Waiver of exemptions; when failure to read instrument will not defeat.* One who can read and write, and had ample opportunity to read the whole of a note containing a waiver of exemptions, before he signed it, can not, in the absence of fraud or misrepresentation practiced on him, set up his own failure to read the note, in order to avoid its stipulations, or in support of a plea putting in issue the fact of the waiver of exemptions.

APPEAL from Montgomery Circuit Court.

Tried before Hon. JAMES Q. SMITH.

The appellants, Goetter, Weil & Co., brought this action against the appellee, Pickett, to recover the amount due upon a promissory note which he executed to them.

The complaint, after describing the note declared on, concludes with the averment "that the defendant waived all exemptions under the constitution and laws of Alabama in the promissory note sued on."

The defendant filed two pleas. The first was a plea of *non assumpsit*. The second was a sworn plea as follows: "For further answer to so much of the complaint as avers 'that the defendant waived all his exemptions under the constitution and laws of Alabama, in the promissory note sued on,' the defendant controverts the same, and denies that in and by said promissory note or otherwise, the defendant waived any or all of his exemptions under the constitution and laws of Alabama."

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Plaintiffs demurred to this last plea, because "it was not a full and complete answer to the complaint, or cause of action sued on."

"The court announced to defendant that it would sustain the demurrer to this plea, unless he admitted the indebtedness set forth in the note sued on, and defendant thereupon admitted said indebtedness, and the court overruled the demurrer."

The note sued on, and which it was admitted the defendant signed, "was the size of an ordinary note, printed with the exception of names, dates, and amounts." The latter part of the printed matter in the note, read as follows: "And as part of the consideration hereof, I hereby waive all right I may have under the constitution and laws of Alabama, to have any of the property of the said ——— exempted from levy and sale under legal process."

It was "proved" that Pickett was a man over forty years of age, of fine education and social position, and has had large interests under his control for many years. Before the note sued on was given, appellants held Pickett's note, which contained no waiver of exemption. "Weil, one of the appellants, met Pickett on the street, and asked him to call by and renew the note held by them, as they wished to use it in bank." Pickett was in a great hurry to get off to his plantation, but replied that he would do so. Pickett testified that plaintiffs did not ask him to give a "waiver note" in renewal of the old note, and did not mention waiver of exemptions to him. "It was proved," that after this conversation, plaintiff unaccompanied by defendant went into the back part of the store, and directed his book-keeper to fix up a note waiving exemptions. Defendant afterwards went in, and the note was handed to him to sign without being read over to him, and without the fact being called to his attention that it waived exemption."

"The defendant then offered his own testimony that he was in a great hurry when approached by Weil, and when said note was signed, being about to leave the city for his farm in the country, and that he (defendant) signed said note supposing it to be an ordinary note without waiver of exemptions, in renewal of his old note in which there was no waiver; that he would not have signed it, if he had known it contained a waiver of exemptions, and that he only read said note so far as to ascertain the amount thereof. The plaintiffs upon this evidence objected to his testifying that

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he had not read the "note," but the court overruled the objection, and plaintiffs duly excepted.

The jury found for the plaintiff, and assessed his damages accordingly, but found further that the defendant did not waive exemption to any part of his personal property, and the court thereon rendered judgment accordingly.

Overruling the demurrer, and plaintiffs' objection to the testimony, are now assigned for error.

SAYRE & GRAVES, for appellants.—1. The demurrer to the second plea ought to have been sustained. It was not a full answer to the complaint. If the appellee did not sign the exemption part of the note, it was not his note—and the law required him to deny its execution *in toto*.

2. There was no evidence of fraud. Where one signs a writing, there being no fraud, he is conclusively presumed to have read it, he being an intelligent man and able to read. 56 Mass. 80; *Squires et al. v. N. Y. Central R. R. Co.* 98 Mass. 239; *Hawkins v. Hudson*, 45 Ala. 482.

L. A. SHAVER, *contra*.—1. Section 2849, Code of 1876, expressly declares, that "in all suits at law or equity, upon instruments in which the exemptions are waived, the complaint or bill shall contain an averment of such waiver, which may be controverted by any person signing the instrument," &c.

Moreover, as shown by the bill of exceptions, the court before overruling the demurrer to the second plea, and as a condition of overruling it, required the defendant to admit the indebtedness. This was an error of which the defendant might well have complained, but it left the question of waiver as the sole issue, and the second plea was then a full answer to the only portion of the complaint in issue.

2. There was evidence from which the jury might have inferred fraud.

3. Fraud was not necessary. The general rule is, that the *mutual assent* of both parties is necessary to constitute a contract. The *contract* itself results exclusively from the *consent*, the *aggregatio mentium* of the parties, without which there can be no contract.

The note in this case not having been negotiated, the suit being between the original parties, there being no interests of *bona fide* purchasers for value at stake, and there being no new consideration, fraud was not necessary.—See *Gibbs v. Lineburg*, 22 Mich. 479.

There is no conclusive presumption that a party signing

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a waive note has read it, for the statute (§ 2849, Code of 1876,) expressly declares, that a *party signing* a waive note may *controvert the waiver*.

BRICKELL, C. J.—1. The statute contemplates that in suits upon instruments in which exemptions are waived, the fact of waiver shall be averred by the plaintiff, and the defendant may, if he does not contradict the existence of the debt, limit his contestation to the fact of such waiver.—Code of 1876, § 2849. The general rule of pleading at common law, was, that a plea in bar professing in its commencement to answer the whole declaration, was bar on demurrer, if its matter was an answer to a part only of the plaintiff's cause of action.—1 Chit. Pl. 523. The statute conferring on a defendant the right of contesting only the fact of waiver of exemptions, when that is expressed in the instrument on which suit is founded, modifies the rule. If his plea or contestation is limited alone to the fact of the waiver—to a denial of the averment in the complaint of the waiver—it is an answer to that averment only; and if it is sustained the only consequence is, that the judgment rendered will not contain a recital of the fact of waiver, though it may be for the debt or demand claimed, and process issuing on it would not authorize a levy and sale of the property exempt. The plea in the present case, is on a proper construction, properly framed so as to put in controversy, no other averment of the complaint, than the waiver of exemptions. It limits the contestation to that fact, and the statute in express terms confers the right of contestation to that extent. Finding that plea true, could not have deprived the plaintiffs of a judgment for the debt and costs, and we do not think it was obnoxious to the demurrer interposed.

2. The remaining question is presented by the bill of exceptions, and is confined to the single inquiry, whether it was competent for the defendant in support of the plea denying the waiver of exemptions, to prove that he did not read the note, at the time of signing it. The evidence without conflict showed that he could read and write, and that he had ample opportunity of reading the note before signing it, and that he did read it so far as to ascertain its amount. There was no misrepresentation to him of the contents of the note, and if he has executed an instrument, he did not intend executing, his own negligence without any fraud or deceit of the party with whom he was dealing, is the cause. The fact that he did not read it, having full opportunity to do so,

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simply proves his negligence and inattention to his own interests, and in the absence of all misrepresentation or artifice by the party with whom he was dealing, was immaterial and irrelevant. A party who having full capacity and opportunity to read a paper, and to whom there is no misrepresentation of its contents, can not set up his own want of attention—his failure to read it, as a fact to invalidate it. *Hawkins v. Hudson*, 45 Ala. 482; *Hallenbeck v. Dewitt*, 2 Johns. 404; *Greenfield's Estate*, 14 Penn. St. 489; 2 Whart. Ev. § 932.

The judgment is reversed and the cause remanded.

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Real Action in the Nature of Ejectment.

1. *Statutory estate of married woman; power to convey.*—The wife's capacity to convey her statutory estate is no greater in equity, than at law; and by the uniform decisions of this court she can not mortgage it, whether alone or jointly with her husband; and if she attempts to do so, no title passes thereby.

APPEAL from Circuit Court of Lowndes.

Tried before Hon. JAMES Q. SMITH.

The appellees, Lehman, Durr & Co., brought their real action of ejectment against the appellants, Eliza Garrett, and Andrew Garrett, her husband, to recover a tract of land in the possession of appellants.

There was no dispute as to the facts, which were as follows: Said Eliza and Andrew were married in Alabama in the year 1858, and have continuously resided together in this State, as husband and wife, ever since, and were at the time of suit brought, in possession of the premises sued for. The evidence showed that Mrs. Garrett derived title to the lands in controversy by a deed made to her on the 13th day of September, 1866, by James Garrett and R. J. Garrett. The consideration of the deed, as therein recited, was \$2,200 paid to the grantors by said Eliza, and the *habendum* clause as follows: "To have and to hold the aforegranted premises, to the said Eliza Garrett, her heirs and assigns, to their use and behoof forever."

Lehman, Durr & Co. claimed title under a conveyance executed to them by Mrs. Garrett and her husband, in Feb-

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ruary, 1870, whereby they conveyed the lands to secure a certain indebtedness to Lehman, Durr & Co., and certain contracts to deliver cotton, upon compliance with which and payment of the debt, the conveyance was to be void; otherwise Lehman, Durr & Co. might enter and sell. The law-day of this mortgage had passed, and about one thousand dollars of the indebtedness secured remained unpaid, when suit was brought. It was shown that the debt secured was that of the husband, and that Mrs. Garrett had nothing to do with it or the making of the conveyance, except to sign it with her husband. Mrs. Garrett had always claimed the lands as her statutory estate, and her husband had always so treated it. This was all the evidence.

The court, at the request of the appellees, charged the jury "if they believed the whole evidence, they must find for the plaintiff," and refused a written charge separately asked by each of appellants, instructing the jury to find for appellants if they believed the evidence. The court further charged the jury that Mrs. Garrett could not make defense at law. The charges given, and the refusal to charge as requested, were duly excepted to, and are now assigned as error.

WATTS & SONS, for appellants.—A mortgage of her statutory estate by a married woman to secure the husband's debt is void, both at law and in equity. This seems to be so well settled on principle, that it is unnecessary to cite authorities.

R. M. WILLIAMSON, *contra*.—The question is, can a mortgage deed executed by husband and wife in accordance with the requirements of the statute regulating the alienation of such separate estates be avoided *at law*, on the ground that the *consideration* of the deed is not such as authorizes such conveyances? In equity the wife has an unquestionable remedy; but in that court she would be compelled to do equity, while the same was meted out to her, and if the debt, or any part of it, was such that her separate estate would be liable for it, she would be required to pay it before the court would grant her relief. Other equities of the grantee might intervene, which would render a decree absolutely annulling the conveyance, inequitable. Husband and wife have a right to convey her separate estate for certain purposes; and it is said that a mortgage of such estate by husband and wife to secure the payment of such articles as the estate would be liable for under the statute, would be

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upheld in equity. These considerations make it necessary that a resort to equity should be required to annul her deed, properly executed. Such deed is not void, for the statute authorizes it; it is only voidable when made upon considerations or for a purpose contrary to the statute.—*Weil v. Pope*, 53 Ala. 587; *Wilkinson v. Cheatham*, 44 Ala. 387.

2. In a court of law the grantee in a mortgage, after condition broken, is the absolute owner in fee; before that court, his estate is a conditional fee. In equity the mortgage is regarded as a security only, and when the debt is paid, or the duty performed, which it is made to secure, it may still be valid in law, but its vitality ceases in equity. This as to mortgages of realty; as to personalty the rule would be different, because the title to such property passes by parol. This was the character of the property involved in *Northington v. Faber*, 52 Ala. 45. The action in that case, too, was as near an equitable suit as can be entertained by a court of law.

In *Doe v. Ball*, 7 Ohio (Hammond), 401, it is held that the consideration of a mortgage of realty can not be inquired into in a court of law; and that, too, in a transaction in which it had been determined that the contract was void as against public policy. At law it is not a mortgage; it is a deed—a contract executed.

BRICKELL, C. J.—It is true, as insisted by the counsel for the appellee, that the fraud which at law will vitiate a conveyance as between parties and privies, must relate to its execution, and that no inquiry will be made into the sufficiency of its consideration.—*Swift v. Fitzhugh*, 9 Port. 39; *Morris v. Harvey*, 4 Ala. 300. The question presented, however, is not one of fraud, or of the adequacy of the consideration; it is simply whether husband and wife may by mortgage convey lands, the statutory separate estate of the wife.

The deed of a wife at common law, whether executed by her alone, or jointly with her husband, was so far as she was concerned, and as an instrument of title to her estate, a mere nullity. The husband may by marriage have acquired an interest in the subject of the conveyance, passing by it, if he joined in its execution, but as to the wife, it was without operation. The statutes and the constitutional provision declaring and defining the separate estate of the wife, strip the husband of all the rights in and to the property of the wife, which he would have acquired by marriage at

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common law, and leave him without any right or interest which may be conveyed or transferred to another. No conveyance by him of the wife's statutory estate is, as against her, valid in a court of law or in equity.—*Patterson v. Flanagan*, 37 Ala. 513.

The incapacity of the wife to contract, as it was known at common law, has not been removed, though it is to some extent modified. So far as this incapacity is modified, the statute has been regarded as enabling, and the power of contracting, or of disposing of her estate, which she can exercise, must be exercised in the mode which is prescribed. In other words, the wife is *sui juris*—capable of contracting, only so far as the statute confers power.—*Pickens v. Oliver*, 29 Ala. 528; *Alexander v. Saulsbury*, 37 Ala. 375; *Warfield v. Ravisies*, 38 Ala. 518; *Bibb v. Pope*, 43 Ala. 190; *Wilkinson v. Cheatham*, 45 Ala. 337; *Fry v. Hamner*, 50 Ala. 52; *Weil v. Pope*, 53 Ala. 585; *Peeples v. Stolla*, 57 Ala. 53.

The power of disposition of the statutory estate, which the wife alone may exercise, is by will. The power of disposition which husband and wife may jointly exercise is expressed in these words: "The property of the wife, or any part thereof, may be sold by the husband and wife, and conveyed by them, jointly, by instrument of writing, attested by two witnesses," "The proceeds of such sale is the separate estate of the wife, and may be reinvested in other property, which is also the separate estate of the wife; or such proceeds may be used by the husband, in such manner as is most beneficial for the wife."—Code of 1876, §§ 2707–09. The power conferred is to sell and convey, and it is sometimes held, when by will or deed, a power to sell and raise a sum of money is conferred, that a power to mortgage, which is a conditional sale, is implied. Whether this is true of any particular power, depends on the nature of the case, the intention of the parties, the purposes for which the power is conferred and must be exercised. These may render it certain that a sale only, or as it is sometimes said, a sale out and out is contemplated and intended.—1 Sugden on Powers, 552; *Haldenby v. Spofforth*, 1 Beavan, 391; *Bloomer v. Waldron*, 3 Hill (N. Y.) 361. A mortgage is a security for a debt in a court of equity, and not a sale, though in a court of law, it operates as a conveyance in fee. The statute contemplates a sale—a conversion of the property into something else which is to be held as the separate of the wife, or which may be used by the husband as her trustee for her benefit. The purpose is not merely to raise money, but it is a conver-

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sion into proceeds which are to become the wife's separate estate—taking the place of the thing sold. The uniform construction of the power has been that it does not include a power to mortgage.—*Bibb v. Pope, supra; Wilkinson v. Cheatham*, 45 Ala. 337; *Fry v. Hamner, supra; Weil v. Pope, supra; Peeples v. Stolla, supra*. True, these were cases in equity, in which the wife was seeking relief against the mortgages, but her *capacity to convey* is no greater at law, than in equity, and it is open to inquiry in the one court as in the other. If she had not the capacity of conveying, no title passed by the mortgage, and the plaintiffs claiming under it were without a right of recovery. The court erred in the charge given, and in the refusal to charge as requested. Reversed and remanded.

STONE, J., not sitting.

Munter & Faber v. Reese et als.

Action on Bond.

1. *Bond; what may be enforced by common law remedies.*—Bonds executed to civil officers, in the course of judicial proceedings, whether authorized by statute or not, if entered into voluntarily, supported by valuable consideration, and not in contravention of public policy or offensive to law, will be enforced by common law remedies.

2. *Same.*—When the bond in suit was executed, there was no law authorizing a sheriff, who had process for the seizure of specific property in a *detinue* suit, to arrest execution of the order of seizure, upon interposition of a claim by a stranger, and the execution of bond to the plaintiff in the suit, conditioned for the forthcoming of the property, if the claim was not successfully prosecuted; yet if in mutual misapprehension of the claimant's rights, she executes, and the sheriff accepts such forthcoming bond, and thereon the sheriff delivers the property to her, the plaintiff in the *detinue* suit, though the bond was taken without his consent, may ratify the sheriff's unauthorized act, and upon judgment in the *detinue* suit and return of *nulla bona*, and allegation and proof of failure to prosecute the claim to effect, may recover upon the bond.

APPEAL from Circuit Court of Lowndes.

Tried before Hon. J. Q. SMITH.

Appellants, Munter & Faber, brought suit against Ann Reese and others, upon a bond executed by the latter to the former. The defendants demurred, the court sustained the demurrer, and plaintiffs declining to amend further, judg-

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ment was rendered for defendants. The nature of the case is sufficiently stated in the opinion.

The judgment on demurrer is now assigned for error.

DAVID CLOPTON, for appellant.

R. M. WILLIAMSON, *contra*.

BRICKELL, C. J.—The questions arising in this cause are presented by the pleadings, and the one of importance is the validity of the bond on which the suit is founded. The complaint sets out the bond *in haec verba*, and its recitals are, that the appellants had commenced an action of *detinue* against one Perry Reese for the recovery of two hundred and thirty bushels of corn, and obtained an order directing the sheriff to take the corn into possession. The sheriff having seized the corn in obedience to the order, it was claimed by the principal obligor, Ann Reese, as her property, and delivered to her on the execution of the bond, with condition “to prosecute her claim to effect or failing therein, shall have the above described corn forthcoming for the satisfaction of said judgment of said Circuit Court if it be found liable therefor, and pay such costs and damages as may be recovered for putting in said claim for delay, then in either of said events, this obligation to be void,” &c. The amended complaint assigns as breaches of the bond, the recovery of judgment by the plaintiffs in the action of *detinue*, and the ascertainment of the value of the corn at one hundred and seventy-five dollars, for which judgment was rendered, together with seventeen 45-100 dollars costs of suit—the issue of execution thereon, and the return thereof, *no property found*. Further, that the bond was executed by the principal obligor to obtain possession of the corn, and that she did thereby obtain such possession, and that she failed to prosecute her claim to effect, and failed to have said corn forthcoming for the satisfaction of the judgment of the Circuit Court, but kept and converted the same to her own use.

It is certainly true there was when the bond was executed, no statute which authorized the sheriff to take it, nor any which authorized a stranger claiming adversely to a plaintiff and defendant in an action of *detinue*, to arrest the execution of an order of seizure by the interposition of a claim of ownership, and the execution of a forthcoming or delivery bond, if he did not successfully prosecute his claim. The bond so far as is shown by its recitals, or the averments of the com-

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plaint, was executed by the principal obligor in misapprehension of her remedy, if she had a claim to the corn, and was accepted by the sheriff in misapprehension of his duty and authority. The want of statutory authority for the bond, and the misapprehension by the principal obligor of her legal remedy, and by the sheriff of his duty, do not necessarily render the bond void. Bonds executed to civil officers in the course of judicial proceedings, whether authorized by statute or not, if entered into voluntarily, and are supported by a valuable consideration, if they do not contravene public policy, or offend the law, will be enforced by common law remedies.—*Sewall v. Franklin*, 2 Port. 493; *Hester v. Keith*, 1 Ala. 316; *Butler v. O'Brien*, 5 Ala. 316; *Whitsett v. Womack*, 8 Ala. 466. As the question is now presented, the bond appears to have been voluntarily executed, and the sufficiency of the consideration, (the delivery of the corn to the principal obligor,) is undisputed. The inquiry is confined therefore within narrow limits—was the taking of the bond offensive to the spirit or policy of the law.

The duty of the sheriff, as prescribed by the statute, was to seize the property, if found in the possession of the defendant in the action of detinue, and to hold it for five days, unless the defendant gave a forthcoming or delivery bond, and thereby regained possession. The defendant, by his neglect to give the bond, would place himself in default, and the plaintiffs had the right to give such bond, and if they neglected for five days, the duty of the sheriff was to restore possession to the defendant.—Code of 1876, §§ 2942–3. The argument against the validity of the bond is, that the sheriff by accepting it, and surrendering possession of the corn to the principal obligor, disabled himself from performing the duties which the statute imposed on him.

The argument overlooks the fact, that the bond is not payable to the sheriff, contains no covenant or promise of indemnity to him, and is only a security for the benefit of the plaintiffs. A promise or a covenant to a sheriff to neglect or to violate official duty is void; and if the bond had been executed in consideration of a violation or neglect of duty by the sheriff—if the purpose had been to prevent the plaintiffs or the defendant in the detinue suit from exercising the right of obtaining possession of the corn, which the statute confers, and of indemnifying the sheriff against loss because of the wrongful delivery to the principal obligor, it may be conceded the bond could not be enforced. But this is not the purpose for which the bond is executed, nor

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is it founded on any such consideration. No violation of law was intended—no departure from the line of duty by the sheriff was contemplated. The obligors supposed the principal was pursuing a remedy and obtaining a right the law conferred, and that the sheriff was complying with a duty the law imposed; that the principal could by interposing her claim of her ownership compel the plaintiffs in the detinue suit into a trial of the right of property, and that on the execution of a forthcoming or delivery bond, it was the duty of the sheriff to surrender possession of the corn. The statutes then existing did not, as we have said, authorize any such proceeding—the proceeding was confined to property levied on by execution or attachment. It is a familiar principle, that bonds intended to be taken in compliance with statutes, though not sufficiently so to be valid under the statute, may be good at common law; and will be, if voluntary, founded on a valuable consideration, and not violative of the law.—*Whitsett v. Womack*, *supra*; *Roman v. Stratton*, 2 Bibb, 199; *Hog v. Rogers*, 4 Monroe, 226; *Winthrop v. Dockendorf*, 3 Greenleaf, 156.

The claim of property by the principal obligor, and a trial of the right in the mode attempted, as a judicial proceeding, was a mere nullity. The fact remains that it was made without the consent of the appellants, and that they have suffered from it all the injurious consequences which could have resulted, if the proceeding had been valid and followed by a judgment in their favor. The event on which the bond was to remain of full force has happened, and there is no principle of the common law, and no statute which inhibited its execution or enforcement.—*Stevenson v. Miller*, 2 Littell, 307; *Claasen v. Shaw*, 5 Watts, 468. Though it was taken without the consent of the plaintiffs, yet intended for their protection and payable to them, they could adopt it, as they could accept any other contract made for their benefit without their knowledge or authority. The sheriff may have rendered himself liable to the plaintiffs or to the defendant in the detinue suit, by parting with the possession of the corn. The plaintiffs have ratified the unauthorized act by the acceptance of the bond, and whatever cause of complaint the defendant may have, is no ground of defense to the appellees.

The judgment is reversed and the cause remanded.

STONE, J., not sitting.

[Ex parte Jones.]

Ex parte Jones.

Petition for Mandamus.

1. *Amendments; to what statute of, does not apply.*—Our statute of amendments does not apply to criminal cases; but the inherent common law power of the courts to correct clerical misprisions, where its records furnish proper basis therefor, extends to criminal as well as civil cases.

2. *Amendment nunc pro tunc; what allowable; what sufficient basis for.* It is the duty of the clerk to tax costs and make a memorandum thereof, and such memorandum when made during the term becomes a *quasi* record, which authorizes the correction *nunc pro tunc*, at a succeeding term, of a judgment rendered at a former term, which left blank the number of days hard labor to which the defendant was sentenced.

APPLICATION for *mandamus*.

The petitioner, Henry Jones, was convicted of the offense of gaming at the October term, 1878, of the City Court of Montgomery, and fined fifty dollars. The minute entry at that term, after reciting the verdict of guilty and the assessing of a fine of fifty dollars by the jury, contains a judgment for fine and costs against petitioner, and proceeds: "And costs not being paid or secured, it is therefore ordered by the court, that he perform hard labor for the county of Montgomery, twenty days for the fine, and at the rate of twenty-five cents per day for the cost until paid, making an additional term for the costs of —— days, and making in the aggregate —— days, for which the defendant is to perform hard labor for the county of Montgomery."

At the February term, 1879, the solicitor moved the City Court to amend *nunc pro tunc* the judgment rendered at the October term, 1878, by inserting the number of days, and in support of the motion, offered in evidence a memorandum of the amount of costs taxed against defendant by the clerk of said court. This memorandum was made out by the clerk before the adjournment of the October term, 1878, on a regular printed form of an execution, such as is ordinarily used in criminal cases, put away in the office of the clerk and produced by him on the hearing of said motion. To the introduction of the memorandum, the petitioner objected; his objections were overruled and he excepted. The City Court thereupon allowed the amendment *nunc pro tunc*, and upon the evidence furnished by this memorandum corrected

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the judgment at the former term, by filling up the blanks with the number of days. The petitioner here moves for a writ of *mandamus* compelling the judge of the City Court to vacate said amendment.

JOHN GINDRAT WINTER, for petitioner.—In a criminal cause, before the defendant can be sentenced to perform hard labor for the costs, the amount must be *judicially* ascertained by the court, for it is the very *basis* of the judgment rendered against the accused; to allow the clerk to ascertain the amount, as a mere clerical duty, would be a substitution and perversion of judicial powers.—Code, § 4731; *Coleman v. The State*, 55 Ala. 173. Costs must be taxed upon conviction.—Code, §§ 5042, 5047. The court having adjourned, without ascertaining the amount of costs to be taxed against defendant, we insist that it could not at a subsequent term do so. Its power over the cause expired with the term.

And even if in any court the amendment could have been made, we insist that there was not sufficient evidence before the court to sustain the amendment. The mere memorandum of the clerk is no part of the record of the court. It can not be considered record evidence; and yet we find that the judgment is amended from a memorandum, *private* in its nature, and not even shown by evidence to be correct.

BRICKELL, C. J.—The statute of amendments is very broad and liberal in its terms, authorizing the correction of clerical errors or mistakes, on the application of either party, “where there is sufficient matter apparent on the record or entries,” to support the amendment. The statute does not however extend to criminal cases. All courts of record have by the common law, an inherent power to correct clerical errors or omissions which may intervene in making up their records. During the term, the proceedings are *in fieri*, the record remains in the breast and remembrance of the judge, and the entries which are to form it, may be altered as he directs, to make them conform to the truth. After the adjournment of the term, if the record, or entries, or memoranda required by law to be made and kept, furnish clear evidence, the misprisions of the clerk may be corrected by them. The power of the court at common law, to make such corrections extended alike to civil and criminal cases—between them, there was no distinction.—*Anonymous*, 1 Gall. 22; *Young v. State*, 6 Ohio, 435; *Sharff v. Commonwealth*, 2

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Birm. 514; *State v. Williams*, 2 McCord, 301; *State v. Seaborn*, 4 Dev. 319.

In entering the judgment of conviction originally, the clerk left blank spaces for the amount of the costs adjudged against the defendant, and the number of days he was to serve at hard labor in payment of them. The insertion of the number of days would have been immaterial, the judgment specifying that twenty-five cents per day, was the rate, at which the labor was to be performed. The clerk taxed the costs during the term the judgment of conviction was rendered, and filed in his office a written statement of them. The taxation of the costs, and the preservation of a bill or memorandum of them, is the duty of the clerk. No execution for their collection could properly issue, without having annexed as a part of it, a copy of such bill. This written statement was a *quasi record* of the court, from which the omission of the clerk to state in the judgment of conviction, the amount of the costs, could be supplied.—*Farmer v. Wilson*, 34 Ala. 75. Admitting the argument of the petitioner, that the omission rendered the judgment incomplete, it was the inadvertence of the clerk. The power of the court to correct it, is derived from the common law, and is plenary; the means of correction resting in writing, it was the duty of the clerk to make and preserve.

Without intending to decide, that if the City Court had erred in the matter, *mandamus* is an appropriate remedy for the revision of the error, we have preferred to decide the question as it is presented by the argument of petitioner's counsel.

Application refused.

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Indictment for Grand Larceny.

1. *Larceny; corpus delicti, how proved.*—It is not indispensably necessary to establish the *corpus delicti* in larceny, where there is no direct proof of the felonious taking of goods, found in the recent and unexplained possession of defendants, and forming part of a stock of merchandise, which might have been disposed of in due course of business by the proprietor of the store or any one of several of his clerks, that all those having authority to dispose of the goods should be called and testify severally, that they had not disposed of them.

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2. *Same*.—In such a case, the testimony of the clerks introduced as witnesses, and suspicious circumstances connected with the possession, may authorize the jury to find that the goods were stolen; though until that fact is found, the defendants are not called on to explain their possession.

3. *Charge; what misleading, and properly refused*.—A charge in such a case, which is so worded, as to lead the jury to infer that it was the duty of the prosecution to make positive proof, that neither the proprietor nor his clerks sold the goods, before the defendants could be convicted, is misleading, and properly refused on that account.

APPEAL from Montgomery City Court.

Tried before Hon. JOHN A. MINNIS.

The appellants, Prudy Roberts and Mahala Williams, were convicted of grand larceny, for the felonious taking and carrying away of "32 yards of blue silk, 30 yards of black silk, 78 yards of black silk, 40 yards of blue silk strip; 13 yards of blue and gold boeretts, of the value of more than two hundred dollars, the personal property of M. P. LeGrand, against the peace," &c.

M. P. LeGrand was a merchant engaged in the dry goods business, and had had among his stock of goods such articles as were described in the indictment, and exhibited in court, after it was shown that these articles had been taken from persons to whom the defendants had delivered them. The loss of the goods was not discovered by those in charge of the store, until they were interrogated about it by the police, after the police discovered the goods, which were taken within twelve months before the finding of the indictment. One Warner was examined in behalf of the State, and testified that he was in charge of the department in which the silks were kept for sale; that he did not sell them or know of their having been sold; that all goods sold or disposed of in the store were promptly accounted for on the books; that he had examined the books and there was no entry or memorandum showing that the goods described in the indictment, produced in court, had been sold or otherwise disposed of; that there were as many as twelve other clerks in the store; that each of them sold goods in different departments of the store as occasion demanded; that they all had access to the goods and authority to sell them; that he was sometimes absent from the store every day while at meals, and was sometimes absent on business; that at such times others had access to the goods; that in addition to the clerks in the store there were two porters and the proprietor; that he recognized a paper which was shown him, [which it was proved had been in the possession of one of the defendants]; that it was an original stock paper, in which there was a piece of silk

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exactly corresponding with the piece exhibited in court; that there was exactly the same number of yards and the color and goods were the same precisely as that shown him; that the mark on the paper was the mark of LeGrand; that he did not know how or when the paper got from the store, and did not know that the paper or silks were stolen from the store, but that he did not sell them or know of any one else having done so.

One Goode, another clerk in the store, testified that he saw Mahala Williams, one of the defendants, in the store two or three days before the goods were missed; that she was sitting at the counter in the department where the silks were kept, and he made a boy watch her, but she was not seen to do anything while there.

Another witness, one Pebworth, testified that the defendants in the latter part of the last year brought some of the silks to her which were exhibited in court. Defendants said there were fifty yards of it, and wanted it made into dresses. Mrs. Pebworth surrendered this silk to a policeman.

The State then introduced one Martin, a member of the police force, who testified that he knew the defendants; that without any threats or inducements held out by him, "Mahala Williams told him that a man sent her one of the pieces of silk from New Orleans; afterwards she said a man from North Alabama sent it to her, she also said that Prudy Roberts gave her some of the silk." The court cautioned the jury that this last statement was not evidence against Prudy Roberts. Another policeman, Payne, testified that he searched for the silks and found the paper referred to in the testimony of the witness Warner; that he found both at Mrs. Pebworth's house, and he identified the silk exhibited in court as that which he found at Mrs. Pebworth's.

The State also introduced two other witnesses, who testified to having bought from the defendant Mahala Williams, pieces of silk which were exhibited in court, and which had been delivered to the police.

The defendants introduced no witnesses; and none of the clerks in the store, or the proprietor thereof, were examined, except Warner and Goode.

The foregoing was substantially all the evidence. The court, at the request of the defendants, gave several written charges, but refused the following charge requested in writing: "If the jury believe from the evidence, that there were as many as ten other persons in the store, beside the witness, who had access to all the goods of LeGrand, and who were

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authorized to sell them, at the time the larceny is said to have been committed, and if the evidence fails to show that neither of these persons sold or disposed of the goods mentioned in the indictment, if they believe they were the property of LeGrand, then they should find the defendants not guilty." The court refused this charge; defendants excepted, and now assign its refusal as error.

J. M. FALKNER, for appellants.—Recent possession of stolen property alone, can not be invoked to prove the *corpus delicti*.—*Fuller v. State*, 48 Ala. 273; Wharton's American Crim. Law, § 745; Bur. on Cir. Evidence, pages 728–9 and 734, and rules; *Chisholm v. The State*, 45 Ala. 67.

Until the evidence showed clearly that there was a felonious taking, no presumption could operate against defendants by reason of their unexplained possession of the goods. Appellants contend that, in the absence of testimony showing that neither LeGrand nor any of his clerks sold or otherwise disposed of the goods, or other testimony tending to show a taking of the goods against the consent of the owner, or that there was no consent to the taking, or parting with the goods by the owner, or any one authorized to represent him—there is wanting that fullness and completeness of proof necessary to establish the truth of the allegation, that a larceny had been committed.

This question was not for the jury to pass upon alone. If the proof failed to show the criminal act, it was the duty of the court to interpose; as in a case where the *corpus delicti* is attempted to be shown alone by the confessions of the defendant—which might be ever so satisfactory to the jury, yet the court would be bound to instruct, that the confessions were insufficient.

The charge asked, and refused, ought to have been given. The effect of its refusal, was to authorize a conviction without proof of the *corpus delicti*.

H. C. TOMPKINS, Attorney-General, *contra*.—The proper question for the consideration of the jury was: had defendants feloniously taken and carried away the goods alleged to have been stolen. Proof that the goods had been the property of LeGrand; that they were found in the possession of persons who claimed to have gotten them from the defendants; that the defendants admitted that they had been in their possession, and made contradictory statements as to how they obtained such possession, was proof sufficient to

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authorize the jury to convict. The charge asked, would require the jury to acquit in the absence of positive evidence showing that the other persons in the employment of LeGrand had not sold the goods. Whether so intended or not, the effect of the charge was to draw the minds of the jury off from the issue. It is true that if the articles had been sold, the defendants could not have been convicted, but the effect of the charge would have been to impress the minds of the jury with the idea that in the absence of positive proof on this question, they must acquit, while in fact the circumstances pointing to their felonious acquisition by the defendants might have been so strong as to satisfy the jury that the goods were stolen. If defendants had purchased the silks they could easily have shown it. In none of their statements explanatory of their possession, did they pretend to have acquired such possession by any purchase of the clerks mentioned in the charge; yet the court is asked to instruct the jury, that the failure of the State to prove that that was not done, which if it had been done, would have been utterly inconsistent with the statements made by defendants themselves, would authorize the jury to acquit. Under the facts of this case, the charge should have been refused. As to what is sufficient proof of the *corpus delicti* in such a case, see *Reg v. Burton* and *Reg v. Mockford*, Fisher's Digest Crim. Law, pages 250, 251.

STONE, J.—To justify a conviction in this case, it was essential that the jury should have been convinced beyond a reasonable doubt that the goods alleged to have been stolen had been feloniously taken and carried away. This necessarily implies that they had not been sold by any person authorized to sell them; and, of this negative fact, the jury must inquire, before the principle could be invoked or applied, that goods recently stolen, found in the possession of the accused, casts on him the duty of explaining how they came into his possession. But, as we have said, this is a negative fact, and it is usually difficult to make direct proof of a negative. In criminal prosecutions, almost or quite any material fact may be proven by circumstances, if sufficiently pertinent and connected. And when so pertinent and connected, they may produce conviction quite as strong and satisfactory, as the positive testimony of witnesses.

In the present case there were many circumstances calculated to throw distrust over the possession of the defendants. These it was the duty of the jury to scan narrowly. If the

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prisoners came by the goods by honest purchase, this fact was more easily susceptible of proof by them, than was its negative by the prosecution. All the circumstances tending to throw distrust over the possession of defendants, tended to prove the goods had been stolen. We do not think the testimony on this point was so weak, that it should not have been submitted to the jury; nor do we think it was necessary, as a legal proposition, that the prosecution should have introduced all the clerks in the store, and proved by them severally, that they did not sell the silks. Had this been done, it certainly would have made a more clearly convincing case for the State; and a failure to do so would probably be commented on by counsel in defense. It did not require the court to take the case from the jury, or to instruct them to acquit. The pith of the charge asked and refused is, that "if the evidence fails to show that neither of said persons—[the proprietor and clerks—]sold or disposed of the goods mentioned in the indictment, . . . then they, [the jury,] should find the defendants not guilty." This charge, if given without explanation, would convey the impression to the common mind that it was the duty of the prosecution to make positive proof that neither of said persons had sold or disposed of the goods. This would have misled the jury, and under all our rulings, the City Court was justified in refusing it.—*Tomkins v. The State*, 32 Ala. 569; *Harrington v. The State*, 36 Ala. 236; *McWilliams v. Rodgers*, 56 Ala. 87; *Clark's Manual of Cr. Law*, § 995.

Judgment of the City Court affirmed.

Steiner & Bro. v. McCall.

Trover for Conversion of Cotton.

1. *Mortgage to secure antecedent or subsequent debt; validity of.*—As between mortgagor and mortgagee and their privies, a mortgage to secure an antecedent debt, or a debt subsequently to be contracted, is perfectly valid; whatever may be its effect as to subsequent purchasers or incumbrancers.

2. *Charge; what properly refused.*—In trover by the mortgagee against one obtaining cotton from the mortgagor, the fact that the mortgagor told defendant before he took it, that the cotton was set apart for plaintiff, is admissible to show that the defendant knew the cotton was embraced in the mortgage and not being offered or relied on to show title in the plaintiff, the court properly refuses, as abstract, a charge that the mere fact the mortgagor made such declaration vested no title in the plaintiff.

[Steiner & Bro. v. McCall.]

APPEAL from Circuit Court of Montgomery.

Tried before Hon. JAMES Q. SMITH.

Appellee, McCall, brought trover against the appellants, Steiner & Bro., for conversion of a bale of cotton.

This cotton was raised in the year 1877, by one Dan Harbouski, on the lands of Martin Knox. On the 18th day of January, 1877, Dan executed his note for two hundred and fifteen dollars, to the appellee, McCall, which note contained the statements requisite to constitute a lien for advances to make a crop. This note was incorporated in a mortgage, which to secure the debt, conveyed a mule, and other personal property, and all the crops to be raised that year by said Dan. The mortgage was duly executed and acknowledged on the 19th day of January, 1877, and duly recorded five days thereafter.

The bill of exceptions recites "there was evidence tending to show that a mule, which constituted part of advances embraced in the mortgage, had been advanced by plaintiff to said Dan for the previous year, 1876, but that said Dan at the end of that year returned the mule to plaintiff, and plaintiff re-advanced the mule to said Dan for the year 1877, on the execution by Dan of the mortgage for 1877."

There was no evidence that any indebtedness for 1876 was carried forward to 1877, or incorporated in the mortgage given that year. There was evidence that the advances were made at the time of the execution of the mortgage. There was also evidence that Martin Knox, the landlord of Dan, had made advances of meat, &c., to enable him to make a crop for the year, 1877, but the amount or value of said advances was not proved. There was evidence tending to show that Dan had turned over the bale of cotton in controversy to Knox to pay for such advances, and that said Knox had disposed of the bale of cotton to the appellants before this suit was brought. There was evidence on the contrary, that Dan received no advances from Knox, and had overpaid the rent, and that Victor Steiner, one of the defendants, made Dan drunk, and while he was in this condition persuaded him to let him have the bale of cotton. There was also evidence that Steiner was told at the time, that the cotton belonged to plaintiff or had been set apart for him.

The defendants separately requested five written charges, which the court refused, and to each of which refusals the defendants separately and duly excepted.

These charges were as follows:

"1. If the jury believe from the evidence, that the debt

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to secure which the mortgage was made, existed before the mortgage was executed, the mortgage is void.

"2. If the jury believe from the evidence, that the advances of \$215 were made before the execution of the mortgage without any agreement that the mortgage was to be executed to secure that amount, then the mortgage is void as to that sum.

"3. If the mortgage debt did not exist at the time of the execution of the mortgage, then the mortgage is void, and plaintiff can not recover.

"4. If the jury believe the mortgage was made to cover advances for a former year, then the plaintiff has no lien on the crops for the year 1877.

"5. The mere fact that Dan Harbrouski declared that the bale of cotton was for plaintiff vested no title in plaintiff."

The refusal to give these charges is now assigned as error.

SAYRE & GRAVES, for appellants.

L. A. SHAVER, *contra*.

BRICKELL, C. J.—Mortgages may be made in consideration of securing antecedent debts, debts created presently or cotemporaneously with their execution, future advances, contingent liabilities, or debts the parties contemplate will be contracted in the future. A mortgage to secure an antecedent debt, may not entitle the mortgagee to protection as a *bona fide* purchaser, while that protection will be afforded when the debt is presently created, and its security by the mortgage is a part of the agreement into which the parties enter. But as between mortgagor and mortgagee, and their privies, a mortgage to secure an antecedent debt, has all the operation and effect, it could have, if made for the security of a cotemporaneous debt. Difficult questions sometimes arise, as to the operation of a mortgage to secure future advances, when the rights of subsequent purchasers, or subsequent incumbrances are involved. None of these questions are now presented, and the sole proposition involved in the instructions requested, is that if the mortgage was executed to secure an antecedent debt, or a debt to be contracted subsequently, it is not valid. The proposition is not sound. If the consideration was a debt to be contracted in the future, and before it was contracted, the appellants had acquired a lien on, or purchased the cotton of the mortgagor, the good faith of the mortgagee in the subsequent transaction would be

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open to inquiry. But in the absence of all imputation of bad faith, the mortgage would be a valid security.

The mere declaration of the mortgagor that he had set apart the cotton for the mortgagee, would not, of course, vest title in the mortgagee; nor do we understand that the title was claimed, otherwise, than through the mortgage. The declaration made to the appellants before they had acquired any claim to, or possession of the cotton, that it had been set apart for the appellee, was material as showing, or tending to show that it was of the property embraced in the mortgage, of which fact the appellants had notice. In no other aspect was it material, or relied on, so far as appears from the record. The charge requested in reference to this declaration, though correct as an abstract proposition, was purely abstract under the facts, and its refusal was not erroneous.

Affirmed.

Moore, Waldman & Co. v. Parks.

Detinue.

1. *Error; what not ground for reversal.*—A party can not complain of a charge which favors him, even though it be erroneous.

2. *Detinue; what does not disable vendor from maintaining.*—P. sold and delivered five bales of cotton to M. & Co., at a stipulated price for cash. P. had purchased two of the bales from his son, who owed M. & Co., who on that account refused to pay for them. A third person had a mortgage on the two bales, which P. agreed to satisfy. P. thereupon agreed with M. & Co. that they might pay the mortgage debt out of the agreed price, and the residue to himself, but made no new agreement respecting the price or sale. M. & Co. paid the mortgage debt, but refused to pay the balance to the vendor,—*held*: the vendor was not divested of title, or disabled from maintaining detinue against the purchaser.

APPEAL from Montgomery Circuit Court.

Tried before Hon. JAMES Q. SMITH.

This was an action of detinue brought by the appellee, William C. Parks, against the appellants, Moore, Waldman & Co., to recover two bales of cotton. The appellee introduced evidence showing that the cotton in controversy was raised by Charles Parks, the son of the appellee, and was turned over by him to his father in payment of rent and advances, with the understanding that fifty dollars of the money

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realized from the sale of the cotton was to be paid to one Dixon, who had a mortgage on it. This cotton, with three other bales, was sold and delivered by the appellee to the appellants, and the sale was for cash. Upon demand of payment, the appellants offered to pay the appellee for the three bales, but refused to pay for the two bales in controversy, "upon the ground that Charles Parks was indebted to them, and they intended to appropriate the proceeds of said two bales to the payment of Charles Parks' indebtedness to them." The appellee refused to allow the deduction, and demanded the price of his cotton or the cotton itself, which was refused. There was evidence that Dixon, who held a mortgage on the cotton in controversy, demanded payment of his mortgage from the appellants, which was refused, and "he took some legal steps towards enforcing his demand." There was evidence on behalf of appellants, tending to show that one Goetter, at the instance of Dixon, got the appellants and the appellee together, and that it was then and there agreed between them, that if the appellants would pay the fifty dollars due Dixon, that they might apply the balance of the proceeds of sale to the debt of Charles Parks to them; but the appellee and his witnesses denied that any such agreement was made. The proof showed that the fifty dollars was paid by appellants to Dixon.

This was substantially all the evidence. Among other things, the court charged the jury, "that if they found for the plaintiff, they must also find the value of the cotton, but that in their verdict they must deduct the fifty dollars paid by the defendants." To this charge the defendants excepted.

The appellants then requested the following written charges: 1st. "If the plaintiff authorized the defendants to pay fifty dollars to Dixon, out of the proceeds of the two bales, it placed the cotton in such a condition that *detinue* will not lie for said two bales, and the plaintiff can not recover." 2d. "If the plaintiff directed fifty dollars to be paid out of said two bales, thereby he elected to treat the transaction as a sale, and he can not recover in an action of *detinue*." The court refused these charges and the defendant excepted. The charge given, and the refusal to charge as requested, are now assigned as error.

SAYRE & GRAVES, for appellant.—The first charge was erroneous. There was no plea of set-off, and it is not a good plea in an action of *detinue*. The charges requested by appellants should have been given. By ordering the payment of fifty

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dollars from the purchase-money of the cotton, the appellee elected to stand by the sale. He can not claim the purchase-money and the cotton both. At all events the appellants had the right to hold the cotton as security for the debt, and there is no evidence that any offer was ever made to repay the fifty dollars, or that any demand was ever made for the cotton. This is a case where a demand was essential. The plaintiff below must have had the entire and exclusive right to the immediate possession of the cotton, to enable him to maintain *detinue*.

THOMAS H. WATTS, JR., *contra*.—If the charge given by the court was erroneous, the appellants can not complain of it, for as to them it is clearly error without injury. The allowance of the fifty dollars as a credit in their favor, could do them no harm, and error without injury is no ground for a reversal. The charges refused were clearly erroneous. The sale was for cash, and it was not complete until the purchase-money was paid. Until the price was paid the title and the right of possession remained in the seller.—See 9 Port. 605; 29 Ala. 294. The sale of personal property in the hands of the vendor, becomes complete only when all the purchase-money is paid.—*McCrae v. Young*, 43 Ala. 622. The right of possession, if no credit be given, remains in the vendor until the purchase-money is paid.—*Magee v. Billingslee*, 3 Ala. 679; *Carroway v. Wallace*, 2 Ala. 542; *Love v. Cook*, 27 Ala. 624.

MANNING, J.—This was an action of *detinue*, brought by appellee, Parks, for two bales of cotton. They were raised by plaintiff's son and delivered by him to his father in payment of rent due the latter, and upon an agreement that he should pay fifty dollars of the proceeds of their sales to one Dixon who had a mortgage on them for that sum.

Parks, the father, bargained these two bales and three others of his own crop, to appellants at a price agreed on, the transaction being a cash sale; and having delivered the cotton as directed, he demanded the price. Appellants then declined to pay for the two bales, and insisted on appropriating the price of them to payment of a debt of Parks, the son, to themselves. In the dispute which followed, according to the testimony for defendants, it was agreed that they should pay the fifty dollars to Dixon, who was there present and received that sum, and apply the residue upon Parks, the son, to them; while according to the testimony for plain-

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tiff, the agreement was that the fifty dollars should be paid to Dixon, and the residue of the price to plaintiff. Which of these was the correct version it was left to the jury to decide.

For appellants, who were defendants below, it is contended that the circuit judge erred in charging the jury that if they should find the issue in favor of the plaintiff, Parks, they should in assessing the value of the cotton deduct the fifty dollars paid by defendants to Dixon. If this was error, it certainly was not one of which defendants can be heard to complain. It was a charge not to their injury but in their favor.

The only other question presented by the record, is founded on charges asked on behalf of defendants and refused. By these the judge was asked to instruct the jury that if plaintiff authorized or directed the payment of the fifty dollars to Dixon, he thereby placed himself in a condition in which he could not bring the action of *detinue*. The argument is that by so doing he made the transaction a sale, and divested himself of the title which he must have to maintain *detinue*.

The charges concede that but for the payment of the fifty dollars to Dixon by authority of plaintiff, the latter was entitled to bring the action; and the question is as to the effect of the payment so made on that right.

Two versions, as we have seen, of what passed between plaintiff and defendants concerning payment for the two bales, were submitted to the jury, and their verdict, which we must of course accept as correct, established that for which the plaintiff contended. According to this, there was no new agreement respecting the price or sale of the cotton, but only a consent on plaintiff's part that fifty dollars of the price should be paid; as he intended to pay it to Dixon, and the residue be paid to himself. If, as the charges requested concede, the title to the two bales remained up to that time, in plaintiff so that he might maintain *detinue* for them, could defendants invest themselves with his title by paying to Dixon only a part of the cash price and refusing to pay the residue to Parks? If we say, yes, we enable the defendants to take advantage of their own wrong, by getting from plaintiff his cotton, without his consent, for a part only of the price, and putting him to an action for the residue; which he may be prevented from recovering, by the insolvency of defendants, or the provisions of the exemption laws.

Parks is put by the charges and exceptions in the situation a merchant would be in, who should offer to sell goods

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at a certain price for cash, to a person who lays down a part of the price and without consent of the merchant, or paying the residue, takes and claims the goods as his own. Clearly the merchant would not be thereby divested of his title.

Let the judgment of the Circuit Court be affirmed.

Steiner & Bro. v. McCall.

Trover for Conversion of Cotton.

1. *Proof of execution of instrument ; when proof of note contained therein.*

Where an instrument is of the character of which registration is authorized and required, to preserve its validity as to *bona fide* purchasers, and at the top is a note or obligation creating the debt it is intended to secure, followed immediately by apt words of conveyance to secure such debt—proof of the execution and recording of the instrument, necessarily includes proof of the note, and authorizes its admission without further proof of execution.

2. *Advances by landlord ; what one claiming under, must prove as to.*—In trover by the mortgagee of tenants, against a defendant claiming crops by delivery from the landlord, whose title depended upon having made advances to the tenants, the defendant must make the same measure of proof as to the amount and value of the advances, as would be required of the landlord, if he were suing the tenants; mere proof that the landlord had made advances, without showing the amount or value, will not defeat the mortgagee's action.

APPEL from Circuit Court of Montgomery.

Tried before Hon. J. Q. SMITH.

Appellee McCall brought trover against the appellants, Steiner & Bro., for the conversion of two bales of cotton.

The cotton in question was raised in the year 1877 by Albert Jefferson and Armistead Reid, upon the premises of one Green Cook, their landlord. Cook by written instrument dated January 10th, 1877, waived his lien in favor of McCall to the extent of advances made by the latter to said Jefferson and Reid.

On the same day, McCall made advances to Jefferson to the extent of \$135, taking his note therefor, which contained the statements required by statute to give a crop lien for advances. It seems that this note was incorporated in a written instrument, which after the heading, "State of Alabama, Butler county," contains the note, and then the words "know ye that to secure the prompt payment of the debt evidenced by the above note," then goes on to mortgage the crops to be raised that year, &c., to secure the debt. The execution of the mortgage was duly acknowledged before a

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justice of the peace, and properly recorded on the 27th day of February following.

Similar advances were made to Reid, who gave his note, and a mortgage like that of Jefferson, which was duly acknowledged and recorded about the same time. Attached to each of these mortgages was a regular certificate of filing and recording, signed by the probate judge.

When the plaintiff introduced each of these instruments, and endorsements thereon, the defendants objected to that part of each which "purported to be the original lien note," because there was "no proof of its execution, and no proof that it had ever been recorded; and also objected to the certificate attached, so far as it could affect the lien notes, on the ground that the certificate related to the mortgage alone, and not to the notes." Each of these objections was overruled, and defendants excepted. Plaintiff offered evidence showing that he had advanced the amounts so stated in the mortgages, and that the cotton sued for was a part of the crop so raised by Jefferson and Reid.

There was evidence tending "to show that said Jefferson and said Reid had been closed out by said Green Cook, and had paid him before the delivery or seizure of said cotton sued for, for advances made by said Cook to them." There was also proof tending to show that Cook, the landlord, had also made advances during the year to said Jefferson and Reid, to enable them to make a crop, consisting of corn, meat, &c., but "no proof was made of the value or amount of said advances." There was evidence tending to show that said Jefferson had turned over one bale of the cotton sued for to Green Cook, in payment of advances so made to them, and that said Cook had disposed of said cotton to defendants, and there was evidence to the contrary of this. Jefferson testified that one of the defendants came and got the two bales of cotton sued for, and at the time Jefferson told him that the cotton was set apart for plaintiff.

The court, among other things, charged the jury, that "to sustain the defense that the cotton was turned over to Green Cook, through whom the defendants claimed, for the payment of advances made to said Jefferson and Reid in the year 1877, it was necessary for defendants not only to show the character of the advances so made, but also the money value in dollars and cents." To this charge defendants duly excepted.

Defendants then requested the court in writing, to charge the jury, "that if Green Cook, the landlord of Jefferson and

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Reid, made advances to them in the year 1877, for the purpose of making a crop that year, and the advances were unpaid and the cotton was delivered to Green Cook for the payment of such advances, it was not necessary in this suit to prove the value of the goods or supplies so furnished. The court refused this charge, and defendants excepted.

The charge given, the refusal to charge as requested, and the rulings as to the admission of evidence, are now assigned as error.

SAYRE & GRAVES, for appellants.

L. A. SHAVER, *contra*.

BRICKELL, C. J.—The instruments under which the appellee deduced title to the cotton in controversy, were of that kind of which registration is authorized, and essential to preserve their validity against *bona fide* creditors, or subsequent purchasers for value, without notice. They embrace not only operative words of conveyance, but the promissory notes, payment of which they are intended to secure. Proof of their execution, therefore necessarily comprehended proof of the execution of the notes. The notes were not more separable from the instruments, than any other of their parts and clauses. The registration of an instrument, of which registration is authorized, renders it admissible in evidence, in any court, without other or further proof.—Code of 1876, § 2154. The objections to the admission of the notes as evidence, without proof of their execution, was properly overruled.

If the appellants deduced title to the cotton, through Cook the landlord, and his title was dependent on the fact that he had made advances to the mortgagors, some evidence must have been given of the value of such advances. The character, kind, and quantity of the things advanced would have been circumstances to be considered by the jury in determining their value. But in the absence of all evidence of value, direct or circumstantial, it would not be possible to support an action at law against the tenants.—*Grant v. Cole*, 8 Ala. 519; *Scott v. Cox*, 20 Ala. 294. When the fact of indebtedness is to be proved collaterally, the evidence to establish it, should be of the character essential, in an action by the creditor against the debtor. Merely proving that Cook had made advances to the tenants, without proof of quantity, or kind, or any direct evidence of value, was insufficient.

Affirmed.

[Evans v. English, and Pearson v. Evans.]

Evans v. English *et als.* Pearson v. Evans *et al.*

Bill in Equity to foreclose Mortgage.

1. *Legal title to personalty taken by husband in payment of debts due the wife ; in whom vests.*—The husband has authority to accept property in payment of debts due the statutory estate of the wife ; and if he does so, intending the transaction for the wife's benefit, without taking title to himself, though without expressly taking title to the wife, the legal title to the property, if it be personal, of necessity vests in the wife, and the husband's mortgage can not divest it.

2. *Legal title to property acquired by husband's exchange of wife's property, where statutory mode of conveyance is not followed ; in whom vests.*—Our statutes prescribe the only mode in which the statutory estate of the wife may be conveyed ; and if the husband exchanges a portion of the wife's statutory estate for other property, the wife's property not having been conveyed in the statutory mode, the legal title to the property acquired by the exchange vests in the husband, and his mortgagee, under circumstances constituting a *bona fide* purchaser for value, without notice, is entitled to protection against the wife's equities to the exchanged property.

3. *Lien for advances to make crop ; to what extends.*—The statute as to advances to make crops, gives the advancer, who complies with its terms, a prior lien upon the crops, and stock bought with the money advanced to enable the party to make a crop ; but it was not intended, and does not have the effect, of enabling the party, obtaining the advances, to give a lien displacing prior liens on property owned at and before the advances, and not procured with such advances.

4. *Same ; what will not constitute.*—The statute will not give an instrument the privileges of the statutory lien for advances, unless its terms conform to the statutory requirements, and it is founded on the precise consideration expressed in the statute ; an instrument securing not only advances, but debts founded on a different consideration, is not what the statute contemplates, and will not give the statutory lien, though if properly framed it may have effect as a mortgage.

5. *Landlord and tenant ; what creates relation of.*—An agreement between two tenants in common, whereby one occupies and cultivates the joint estate, contracting to pay the other a stipulated rent for his portion, creates the relation of landlord and tenant between them, with its usual rights and incidents.

6. *Landlord's lien for advances ; what necessary under act of March 8th, 1871.*—The statute of March 8th, 1871, (prior to its amendment, § 2467 of Code) giving the landlord a lien for advances, &c., required that the advances should be made by the landlord himself, and for the purpose of aiding in the cultivation of the rented lands for the current year ; if the advances were not thus made, and for the specified purpose, the statutory lien did not attach as to such particular items—*e. g.*—as where the landlord forbore to collect his rent for a previous year, and re-rented for another year, under an agreement that the amount of back rent should be an advance for the current year.

APPEAL from Lowndes Chancery Court.
Heard before Hon. H. AUSTILL.

[Evans v. English, and Pearson v. Evans.]

The original bill in this cause was filed by Jane E. Evans, against C. J. English, Alice English, his wife, James M. Pearson, Levystein & Simon, and sought the foreclosure of a mortgage executed by C. J. English to her on the 13th of January, 1874, on certain horses and mules and other personal property, and the crops to be grown by him on a plantation known as the English-Pearson place, in Lowndes county. All the defendants answered. Mrs. English averred that the property mortgaged was her statutory separate estate, and the mortgage, as to her, was invalid. Pearson set up a claim for rent, of an undivided half interest in the premises, and for advances made by him to C. J. English; and Levystein & Simon made their answer a cross-bill and asked the foreclosure of a mortgage made to them by C. J. English on the 28th day of February, 1874.

The evidence discloses the following state of facts: On the 19th November, 1872, C. J. English borrowed of Mrs. Evans some money, and as security for this money, and some advances made to enable him to make a crop for the year 1873, he executed to her on that day his note for the sum of \$2,279.25, payable January 1st, 1874, secured by a mortgage on the following property, to-wit: Nine mules named respectively Puss, Fanny, Pigeon, Lize, Lizzy, Frank, Rock, Crack and Mike, one four-horse and one two-horse wagon, one gin and press and all the farming implements then used on the plantation then cultivated by C. J. English. This note was not paid at maturity, and on the 1st January, 1874, C. J. English sold the mules and other property embraced in said mortgage, and three other mules and two mares to Mrs. Evans, giving her a bill of sale therefor.

On the 13th day of January, 1874, Mrs. Evans resold the mules and other property mentioned in the bill of sale to C. J. English, and received in payment for them a mortgage executed by English, which covered the crop to be raised by him in 1874 on the Pearson-English place, and the following mules and horses: Puss, Fanny, Pigeon, Lize, Frank, Rock, Crack, Lucy, Mike, Lizzie, Manda, Sarah, Charley, Mary, Alice, certain cows, naming them, and the other personal property embraced in the first mortgage.

C. J. English and Alice, his wife, were married in 1869, and soon afterwards her husband received from her guardian eight thousand dollars in cash, and two thousand dollars in notes. Lewis C. Reese, the maker of one of these notes, turned over to the husband in payment four mules, named Mike, Bill, Pigeon and Sallie; two of which are embraced in

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the mortgage, namely, Mike and Pigeon; one had died, and one had been exchanged for the bay mare Mary, mentioned in the mortgage. It was shown that the husband, with the money of the wife's statutory estate, had bought from a Kentucky drover seven mules, called Puss, Fanny, Lizzie, Rock, Crack, Frank and Lige, which were the mules embraced in the mortgage.

It was also shown that the place which was cultivated by C. J. English for the year 1874 belonged to his wife Alice, and Mrs. Pearson, wife of the defendant, James M. Pearson, as tenants in common, each owning one half, and that for several years English had rented Mrs. Pearson's portion of said land. Pearson testified that in 1873 he had rented his wife's portion of said land to English for the sum of \$750; that in December of that year, English called on him and told him that his cotton crop was packed and subject to his claim of rent; and at the same time told him that the worms had cut his crop short, and that unless Pearson would assist him, he did not see how he could make a crop for the year 1874. At the same time English stated that while he regarded the rent of \$750 as reasonable, for the reasons above stated, he could not pay that amount for the year 1874, and proposed that the rent for that year be placed at the sum of \$375, and that Pearson allow him to keep the cotton he then had, and which was subject to Pearson's claim of rent, as an advancement for 1874, and make a further advance of three hundred dollars. Pearson assented to this arrangement, upon the express understanding that all was to be considered advances for 1874, and all of it should be used in making his crop in that year. Pearson testified that in pursuance of said agreement, he made the following advances to English: On the 30th day of December, 1873, \$50; on the 7th day of January, 1874, check on Merchants' and Planters' Bank for \$250; on the 9th day of February, 1874, Pearson gave English credit for supplies at the Louse of J. & B. Trimble to the amount of \$23.25, and accepted his draft on Lehman, Durr & Co. for \$100. Pearson also advanced \$26.49 to English to pay taxes on the plantation.

On the 7th day of January, 1874, English executed and delivered to Pearson his note for the sum \$1,568.49, which Pearson testifies was the amount of advances that year, eight per cent. interest thereon, and \$375 rent for 1874, and did not include the credit given at Trimble's, or the bill of exchange on Lehman, Durr & Co. Pearson testified that in the latter part of November, or early in December, 1874, he

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had received from English nineteen bales of cotton, grown on the Pearson-English plantation, in that year, and that he had sold the same and applied the proceeds (some \$1,205.73) to the note of English, given as above stated.

Pearson further testified that he knew nothing of Mrs. Evans' claim to the property, until a short time before he received the cotton, when he was asked by her agent if he intended to take the cotton, and upon announcing his intention to do so, was informed English "was owing Mrs. Evans for advances on stock."

The claim of Levystein & Simon arose as follows: English, on the 28th day of February, 1874, being in need of advances, executed his note to Levystein & Simon for the sum of \$500, which declared "that said amount was obtained *bona fide* as an advance, for the purpose of making a crop, and without such advance it would not be in my [English's] power to procure the necessary team, provisions and farming implements to make a crop." This note was included in a written instrument or mortgage executed by English on the same day to Levystein & Simon, which, after reciting the note and the purpose for which it was given, bound him to deliver to them for sale at stated commissions, his entire crop of cotton, and in default of such delivery to pay commissions, and the usual note of storage for one month in the city of Montgomery, "as liquidated damages," &c., and concluded: "Now, therefore, in order to secure the payment of said note or writing, the delivery of said cotton for storage and sale, and also to secure the payment of any further indebtedness due and owing by me to the said Levystein & Simon, whether for future advances, supplies of bagging, rope and ties, the payment of bills and drafts accepted for my accommodation or otherwise," I have granted, bargained and sold "the entire crop of corn and cotton which may be made and grown during the present year on the plantation in Lowndes county which I am cultivating the present year," and the mules and horses embraced in the mortgage given to Mrs. Evans in January, 1874. It was shown by the testimony of J. Simon that the amount due Levystein & Simon on their mortgage, was six hundred and eighty dollars, which amount they had advanced to English in money and merchandise.

None of the witnesses testify as to the source from which the mules Manda, Lucy and Sarah, or the horse Charley, or the farming implements, wagons, gin and cotton press, described in the mortgage to Mrs. Evans, were derived.

Mrs Evans' mortgage was duly recorded on the 17th day

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of January, 1874, and Levystein & Simon's mortgage was recorded on the 27th day of March following.

The chancellor decreed: 1st, that the claim set up by Mrs. English to the stock and implements mortgaged to her by C. J. English and to Levystein & Simon was sustained, except as to the mule Manda; 2d, that J. M. Pearson has a lien for the rent due him for 1874, to-wit, for the sum of three hundred and seventy-five dollars; and a lien for the following sums advanced by him as landlord, to-wit, \$300 in cash; \$23.25 paid to the house of J. & B. Trimble, and \$110.68 paid to Lehman, Durr & Co., which lien was superior to both the claims of Mrs. Evans and of Levystein & Simon on the crop, and that he had no further lien on the crop; 3d, that Levystein & Simon had a lien on the property embraced in their mortgage, which was superior to the lien of Mrs. Evans' mortgage.

A reference was ordered to ascertain the amount due to J. M. Pearson, Levystein & Simon and Mrs. Evans.

Mrs. Evans appeals and assigns: 1st. The decree declaring the mules embraced in her mortgage to be the property of Mrs. English.

2. The decree giving Levystein & Simon a priority over her.

3. The decree giving J. M. Pearson a prior lien for rents of 1874, and for advances made by him to English, over her mortgage.

Pearson also appeals, and by consent under the rules, assigns the failure to decree a prior lien on the crop in his favor, for the full amount advanced to English over all other liens, as error.

WATTS & SONS, for Mrs. Evans.—As against Mrs. Evans, none of the property can be said to belong to Mrs. English. Mrs. Evans had no notice of her claim, and parted with her money in ignorance of any claim by her to the property. Under the first mortgage, Mrs. Evans was a *bona fide* purchaser without notice, and for value.—*Morrow v. Wells*, 38 Ala. She was also a *bona fide* purchaser without notice under the bill of sale, dated January, 1874. The fact that the consideration for the property included in it, was a past due debt, makes no difference.—See *Saffold v. Wade*, 51 Ala. 213; *Shepherd v. Shaefer*, 45 Ala. 233; 51 Ala. 478; *Preston & Stetson v. McMillan*, 58 Ala.

Pearson had no contract of renting declaring a lien for advances. The statute requires such a contract to be prop-

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erly recorded; and without such contract he had no lien, at least so far as the advances are concerned.

Levystein & Simon's mortgage bears date subsequent to Mrs. Evans, and the only theory upon which the decree, giving a priority over her, can be sustained, is that such priority is given by the statute. The statute gives a lien "on the *crop and stock bought with the money advanced.*" It is not pretended that any of the stock embraced in the mortgage was purchased with money obtained from them. They certainly could have no claim, except on the crop, by virtue of any lien for advances. As a mere mortgage, it is clear that the right of Mrs. Evans is superior to theirs. The mortgage or lien of Levystein & Simon was for \$500. The other advances were to be made in the future, and the statute gives no lien except for advances made *at and before* the execution of the written paper.

DAVID CLOPTON, and R. M. WILLIAMSON, for J. M. Pearson.

COX & HAUGHTON, for C. J. English.

Neither of the briefs for the other parties came into the Reporter's hands.

BRICKELL, C. J.—These are cross-appeals from a decree foreclosing a mortgage executed to the appellant, Jane E. Evans, by C. J. English, and adjusting conflicting claims and liens to the mortgaged property. The property consisted of mules, horses, cows, farming implements, a gin, cotton press, and the crops of cotton and corn grown by the mortgagor in 1874. It was all, except the crops, claimed by the wife of the mortgagor as her statutory separate estate, and the first inquiry is, whether any part of it, and what part, was her estate.

The husband and wife were married in 1869, and soon thereafter the husband received from the guardian of the wife eight thousand dollars in cash and two thousand dollars in notes. One of the notes was on Lewis C. Reese, from whom the husband as a payment received four mules, called, respectively, *Mike, Bill, Pigeon, Sallie*. Two of these mules are embraced in the mortgage, viz: Mike and Pigeon. One of the others had died, and the other had been exchanged for the bay mare *Mary*, embraced in the mortgage. The husband with the money of the wife purchased from a Kentucky drover seven mules, which seem to be those embraced

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in the mortgage, and called *Puss, Fanny, Lizzie, Rock, Crack, Frank, Lige*. The original mortgage was executed to secure a debt cotemporaneously created, was the consideration on which credit was given the mortgagor, and constitutes the mortgagee a purchaser for valuable consideration—protected against equities of which she had no notice.—*Wells v. Morrow*, 38 Ala. 125; *Fash v. Ravisies*, 32 Ala. 451; *Saffold v. Wade*, 51 Ala. 241. The subsequent sale to the mortgagee, the resale to the mortgagor, and the mortgage back by him, did not divest her of that character. The transaction was nothing more than a renewal of the debt, and of the security for its payment.—*Boyd v. Beck*, 29 Ala. 703. It is insisted for the mortgagee, that the only claim of the wife of the mortgagor to the mules, is an equity to charge them with the payment of her funds invested by the husband in their purchase, or to take them as her property instead of such funds, and that against such claim she is protected as a *bona fide* purchaser.

The proposition rests on the theory, that the husband by the purchase acquired the legal title. We can not admit this theory; on the contrary, it seems to us founded in a misconception of the power and duty of the husband under the statutes creating the wife's statutory estate. The power and duty of the husband is to receive the separate estate of the wife, whether it consists of money, choses in action, or other property, real or personal, and his receipt is a good discharge in law or equity to the person surrendering to him.—Code of 1876, § 2710. This power he exercises solely, and not jointly or concurrently with the wife. The property thus received vests in him as trustee, and he has *the right to manage and control the same*.—Code of 1876, § 2706. It is apparent that *the title* does not vest in the husband—that remains in the wife unaffected by the marriage, and unaffected by any act of the husband after marriage. The wife is enabled by the statutes to hold it as her separate estate. The possession vests in the husband, while the title remains in the wife. The possession vests in the husband as her trustee, that he may *manage and control* the estate, taking the rents and profits without liability to account. There can be no doubt that the husband had the power, and that it was his duty to collect the debts due the wife he had received from her guardian. The power was not a mere naked agency, coupled with no interest, and is not to be measured by the principles which would control such an agency. It is a power conferred on him as husband and as trustee, in the

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exercise of which, he is of necessity clothed with a large discretion. In the collection of debts if he deems it prudent, he can accept property in payment; and if he does not take title to himself, intending the transaction for the benefit, and as an investment for the wife, if the property is personal, from the nature of the transaction, the legal title to such property will as matter of law inure to her. The title to personal property will pass by mere delivery of the property, without writing, and to whom it passes, often depends on the facts of the particular transaction, the consideration, and from whom it really moves. It may pass to an undisclosed principal, or to an undisclosed *cestui que trust*, and whether it will, without ratification by them, the authority of the agent, or the power of the trustee who enters into the transaction, and does not expressly take title to himself, will determine. The title of the wife to the debt on Reese paid by the purchase of the mules was legal, not equitable. The mules were a mere substitute for the debt—accepting them in payment was a mere mode of collecting. If money had been paid, the title of the wife to the money would have been a legal title. Her title to the mules, the transaction being intended for her benefit, and as an investment for her, follows the character of her title to the debt. The husband did not in accepting the mules as a payment of the debt exceed his power as trustee, and there is no circumstance indicative of an intention on his part to change the character of the wife's title, or to acquire title for himself. Though it would be more prudent in such transactions that he should take written evidence of title to the wife, the property being personal, the title to which may pass by parol, the law does not compel him to do so to secure the title to the wife. The case of *Bolling v. Mock*, 35 Ala. 727, depends on its own facts, and bears no resemblance to the present case. In that case the husband having in his possession a promissory note the property of the wife, without her concurrence, transferred it in the purchase of property. The transfer was an excess of his power as trustee, a breach of trust, and did not divest the wife of her legal title to the note.—*Smyth v. Oliver*, 31 Ala. 39. Of consequence, the only claim of the wife to the property purchased, was equitable, growing out of the doctrine of implied or constructive trusts, which prevails only in a court of equity. Here, the husband has not exceeded his power—has committed no breach of trust. The power of collecting the debt with which the statute clothes him has been exercised, and the mode of collection adopted, has been the acceptance in payment of persona

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property, not taking title to himself, but leaving the title to follow the title to the debt paid. As the title to the debt was legal, vesting exclusively in the wife, we can not doubt her title to the mules was of the same character.

The statutes are silent as to the use or investment of moneys the separate estate of the wife, which the husband receives. It can not be supposed that it was contemplated these should remain in his possession unemployed, unproductive, a barren fund. Having the power to manage and control it, and the possession of it vesting in him as trustee, he may loan or invest it in property as he may deem best. *Marks v. Cowles*, 53 Ala. 499. When he invests in personal property, not taking title to himself, as matter of law the legal title inures to the wife.

The mortgage by the husband of these mules did not pass the legal title of the wife. It was an assumption of ownership and power by the husband, inconsistent with the trusts imposed by law, and had no more effect on the right and title of the wife than a disposition by a stranger.—*Patterson v. Flanagan*, 37 Ala. 513. We hold consequently the chancellor did not err in decreeing that the title of Mrs. English to the nine mules, called *Eliza*, *Puss*, *Fanny*, *Pigeon*, *Lizzie* or *Liz*, *Mike*, *Rock*, *Crack*, *Frank*, was paramount to and must prevail over the mortgage, or rather that as to these mules, the mortgage was void and inoperative. In this connection we will say, that we are not satisfied from the evidence that Mrs. English has any claim to the mules, *Lucy*, *Mandy*, *Sarah*, or to the sorrel horse *Charley*, or to the farming implements, wagons, gin, or cotton press, embraced in the mortgage. While it is very clearly shown from whom the mules were purchased, the amounts paid for them, and that these were assets of the wife's separate estate, the testimony is silent as to the acquisition of the other property. The chancellor therefore erred in decreeing that all this property was not subject to the mortgage.

The bay mare, *Mary*, seems to have been acquired by the husband by an exchange of one of the mules purchased from Reese. The only mode of conveying the wife's statutory estate, is by an instrument in writing executed by husband and wife jointly, and attested or acknowledged as the statute prescribes.—Code of 1876, §§ 2707-9; *Synth v. Oliver*, 31 Ala. 39; *Whitman v. Abernathy*, 33 Ala. 154; *Warfield v. Ravisies*, 38 Ala. 518; *Alexander v. Saulsbury*, 37 Ala. 385. The exchange of the mule for the mare was not made in this mode—was the unauthorized act of the husband and a breach

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of trust. Whatever were the rights of the wife to the mare, under the authority of *Bolling v. Mock, supra*, they were merely equitable, the legal title passing to the husband. The mortgagee standing as a *bona fide* purchaser without notice of the wife's equity is entitled to protection against it. The chancellor therefore erred in decreeing that Mrs. English had the superior claim to this mare. It may seem singular that the husband can use the moneys of the wife in purchasing property, to which the wife will acquire a legal title; or that he may accept personal property in satisfaction of a debt due her, and the title will inure to her; and yet he may not exchange the most insignificant article of personal property for another, (unless he pursues the mode of conveyance prescribed by the statute,) so that a legal title will pass to her. Such is the effect of the statutes, and their limitations on the power of the husband. Restraints on the power of disposition of the wife's fortune which the common law would give the husband, is a clear, controlling purpose of the statutes. The power he exercises in the collection of debts due the wife, or in the investment of her money, is conferred on him as trustee, and on him solely, and is not properly a power of alienation or disposition. The power of alienation or disposition is conferred on husband and wife, to be exercised by them jointly, in a particular mode, and excludes alienation in any other mode, or by the separate act of either.

The next question which arises, is as to the respective rights of the appellant, and of Levystein & Simon. The chancellor regarding Levystein & Simon as having a statutory lien for advances to make crops, decreed that though their lien was younger, it was superior to that of the appellants not only on the crops, but on the stock. As to the stock, the decree was clearly erroneous. The lien which the statute authorizes is on the crop, and on the stock bought with money advanced to enable the party to make the crop. No lien is authorized by the statute, taking precedence of prior liens, on stock or property owned by the person obtaining the advances at or before the time they are made. It is the crop, and the stock advanced, or purchased with the money advanced, on which, if it is declared as the statute directs, a lien having priority is fastened. The statute does not intend to disturb and displace prior liens on stock or farming tools, or implements, or any other property than the crop, which the debtor may own at the time of the advance. As to such property, the debtor is not armed with the power of nullifying and destroying prior liens he may have created. The words of

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the statute are "the advance so made, or the amount thereof shall be a lien on such crop, and the stock bought or furnished with the money so advanced." It is just, and such are the words and spirit of the statute, that as the stock is acquired, or the money to purchase it, from the party making the advance, he shall have the prior lien on it. The debtor should not keep it without paying for it, and those dealing with him, have no just cause of complaint, that he is not able to transfer it so as to defeat him who advanced it, or furnished the money with which it was purchased. It would be unjust, and the statute does not warrant it, that as to the property already owned by the debtor, to the acquisition of which the party making the advance did not contribute, the debtor should confer on him a lien superior to that others had previously and fairly acquired. The only claim which Levystein & Simon can assert to the property other than the crop, is that of mortgagees. Their mortgage is junior and subordinate to that of the appellant.

Is their lien on the crop superior to that of the appellant? It can take precedence of the prior mortgage to appellant, only by virtue of the statute. The statute will not give it that operation, unless the terms of the instrument creating it conforms to the statutory requirements, and it is founded on the precise consideration expressed in the statute.—*McLester v. Somerville*, 54 Ala. 670; *Dawson v. Higgins*, 50 Ala. 49. It is not security for any other debt or contract, whatever may be its consideration, the statute contemplates. The instrument under which Levystein & Simon claim, does in terms conform to the statutory requirements, but its stipulations show that its consideration was not only advances made, but future advances contemplated, whether for the purpose of enabling English to make a crop, or for any other purpose, and to secure the payment of damages, if he should not keep his contract to deliver cotton to Levystein & Simon for storage and sale on commission. We can not regard such an instrument as creating the statutory lien. The statutory lien is capable of enforcement by attachment at law. If this instrument could be so enforced, for so much of the debt it secures as is really for advances, as to the remainder it could be enforced only by another suit at law or in equity. A multiplicity of suits would be encouraged; or it may be that the party splitting a cause of action, would recover for a part, and be barred of a recovery for the remainder. We have decided that as the effect of the statutory lien is to displace prior liens, created by mortgages or other instru-

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ments, the statute must be strictly construed. A simple security, for a debt founded on the consideration of advances to enable a party to make a crop, the statute authorizes. Commingling other debts founded on other considerations, and a security for all, is not intended. Such security may be taken by mortgage or other appropriate instrument. But whatever may be the terms of the instrument, it is not the security the statute authorizes, and is not entitled to the statutory priority. The claim of priority on the crops asserted by Levystein & Simon, should not have been sustained. Their only right is as junior mortgagees.

A tenant in common occupying and cultivating the joint estate under an agreement to pay his cotenant a stipulated rent for his half, is liable for the rent in an action at law. *Lockard v. Lockard*, 16 Ala. 423. We can perceive no substantial reason for declaring that in such case, so long as the agreement continues, the relation of landlord and tenant does not exist, and that the one has not the lien of a landlord on the crop grown on the premises for the stipulated rent. The chancellor properly decreed Pearson had a landlord's lien on the crop for the agreed rent, prior in point of right to the mortgage to the appellant.

The statute of force giving a landlord a lien for advances to his tenant, when the advances were made by Pearson was the act of March 8th, 1871, (Pamph. Acts 1870-71, p. 19.) The lien declared was for "advances made, to assist or aid in the cultivation of said land for the current year." Whether the advances should be in money, team, farming implements, provisions, or labor, the statute does not declare. They must be made however by the landlord himself, and *to assist or aid in the cultivation of the land for the current year*; and consequently must be adapted to and intended for that purpose. It is a debt founded on this particular consideration, for which the statute creates a lien, and no arrangement between landlord and tenant can attach the lien to any other debt. They may agree that other debts contracted on other considerations shall be deemed advances, but they can not thereby entitle them to the statutory lien. It seems obvious to us, there is no part of Pearson's claim for advances which can be supported, unless it is for the three hundred dollars loaned. The debt for the rent of the land for the preceeding year could not be converted into an advance, though Pearson in consideration of English's promise that it should be deemed such, abstained from pursuing his statutory lien on the crops. The acceptance of English's draft in favor of

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Lehman, Durr & Co., and the credit given English with Trimble, created no other relation than that of principal and surety between them, and was not an advance within the meaning of the act of 1871. That act contemplated an advance directly by the landlord, and not by another on his credit. Since, the statute has been amended so as to embrace advances of this character.—Code of 1876, § 3467. The three hundred dollars loaned, was according to the evidence, an advance to assist in the cultivation of the crop, for which Pearson was entitled to the prior lien.

We have disposed of all the assignments of error, and on the appeal by the appellant Jane E. Evans, the decree is reversed and the cause remanded, that the chancellor may proceed to render a decree in conformity to this opinion. The appellees in that appeal must pay the costs thereof in this court and in the court of chancery. On the cross-appeal by James M. Pearson, the decree is affirmed, and he must pay the costs of appeal in this court and in the court of chancery.

STONE, J., not sitting.

Sprague *et al.* v. Shields.

Bill in Equity to foreclose Mortgage.

1. *Bill; when demurrable.*—A bill to foreclose a mortgage of lands by a married woman, is demurrable, unless it sets forth the substance, at least, of the deed or other instrument under which the estate is held, that the court may determine the nature of the estate, and her power over it.

2. *Equitable estate; what creates.*—A legacy to a married woman under the provisions of her father's will, directing that the amount "shall go into the hands of a trustee for her use and behoof, and no other," manifests a clear intention to vest in her an equitable estate; and where the trustee purchases lands, it is his duty to take a conveyance on the same trusts; and he having done so, a marriage settlement entered into by the wife, after the husband's death, upon the eve of a second marriage, can not alter her estate as to such lands, whatever effect it might have on after acquired property; and the wife may bind such estate by her contracts, notwithstanding her coverture and the terms of the marriage settlement.

APPEAL from Chancery Court of Mobile.

Heard before Hon. H. AUSTILL.

The appellee, as surviving partner of the firm of Milhouse,

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Shields & Co., sought by his bill to foreclose a mortgage made to said firm on the 13th day of January, 1872, by Mrs. E. C. Sprague, A. M. Sprague, her husband, and S. W. Oliver, conveying a house and lot in the city of Mobile.

The bill, after describing the lands, states that they were the "lot of land conveyed to John S. Hunter, deceased, on the 27th day of May, 1851, as trustee for said Elizabeth, by A. L. Pope and others; that said Hunter during his life-time held the legal title to said lands, as a mere naked legal trustee, and that he died before the execution of said mortgage; that said Elizabeth C. Sprague held said lands as her separate estate by contract, and that she had a right to, and in this equitable court did bind the same," for the payment of the note which the mortgage was given to secure. It appears from the bill that the consideration of the note was certain indebtedness of the husband, and also certain advances made to carry on certain plantations in which Mrs. Sprague was interested. At the date of the filing of the bill, the indebtedness secured by the mortgage amounted to several thousand dollars.

Mrs. Sprague admits the execution of the mortgage and notes; that the house and lot were her property, and were held by her brother John S. Hunter as her trustee; that both the deed and the mortgage were executed during the life of her husband, A. M. Sprague, who died prior to the filing of the bill. She avers in her answer that the mortgaged property came to her by inheritance, and constituted her statutory separate estate, and pleaded her coverture in avoidance of the mortgage.

The will of Mrs. Sprague's father, and also the deed conveying the premises in controversy, were introduced in evidence, though neither was set out in the pleadings.

Mrs. Sprague, at the time of her marriage with A. M. Sprague, was the widow of one Oliver, and her second marriage occurred before her father's death.

Before her marriage with Sprague, a marriage contract or settlement was entered into between her and her intended husband, which conveyed all the property she then owned, or which she might thereafter acquire, to one Bolling as trustee, and this settlement recognized the marital rights of the husband as to the income, and recites that it was entered into, because the husband was unwilling that the property of his intended wife should be subject to his debts.

The will of Mrs. Sprague's father bequeaths to her one-third of the value of certain slaves, and directs that said

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sum shall "go into the hands of said John S. Hunter as trustee for Elizabeth C. Sprague for her use and behoof, and no other."

The deed to the house in controversy, shows that it was made in the year 1851, by commissioners under a decree of the Chancery Court, to John S. Hunter as trustee for Mrs. Elizabeth C. Sprague, and its granting clause was as follows: "For and in consideration of the sum of \$10,000 to us in hand paid by John S. Hunter, trustee of Mrs. Elizabeth C. Sprague, the receipt whereof is hereby acknowledged, do hereby grant, bargain, sell and convey unto said John S. Hunter, trustee of Mrs. E. C. Sprague, and for her sole and separate use, free and discharged from the debts or claims of her husband," the following lot of land, describing it. The money thus paid was part of the legacy given by the will.

Mrs. Sprague demurred to the bill on several grounds; among others, that it failed to show clearly that the estate in the lands sought to be condemned, was such a separate estate as she could bind by her contracts. The demurrer was overruled, and the chancellor decreed that complainants were entitled to relief, and directed a reference, &c.

This decree is now assigned as error.

STEWART & PILLANS, and E. S. DARGAN, for appellant. The bill is fatally defective, and the demurrer of appellant should have been sustained. The only allegations in the bill to sustain the decree are, "that John S. Hunter held the title to the property in trust for Mrs. Sprague, and that Mrs. S. held the land as her separate estate by contract, and had the right to dispose of it. These allegations are plainly insufficient. They are but the legal conclusions of the pleader, and not statements of fact. The facts are the written terms of the deed, and these should have been set forth or the deed itself made an exhibit to the bill.—*McDonald v. Mobile Life Ins. Co.*, 56 Ala. 468. The legacy accrued to Mrs. Sprague in 1851, and was clearly subject to the law regulating the statutory separate estates of married women, and it is clear that the wife could not mortgage her estate to secure the debt of her husband. The legacy bought the house, and the house as well as the legacy could not be bound by the wife to pay debts of the husband.

J. LITTLE SMITH, *contra*.—The deed under which Mrs. Sprague held the premises creates in her an equitable separate estate. It conveys the lot to John S. Hunter, trustee

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for her sole use, free and discharged from the debts and claims of her husband. This lot being her equitable separate estate, it is immaterial whether she signed [as principal or surety].—44 Ala. 339; 17 Ala. 797; 19 Ala. 682; 30 Ala. 283; 34 Ala. 535; 40 Ala. 561. The money which was invested in this house, came to Mrs. Sprague under the will of her father, who died in 1846, and the will directs the legacy to be held by a trustee for *her use and behoof, and no other*. This stamped on the legacy a trust which can not be changed, and gave her a vested right to the property charged with the trust declared, and no other. There was at the time of the testator's death no separate estate, save a contract separate estate, and words more adapted to create such an estate could not well be used. They express a clear and well defined purpose to exclude the marital rights of the husband, and give to the wife an estate free from his control and subject to any contract she may make.—39 Ala. 514; 38 Ala. 115; 18 Ala. 84; 26 Ala. 36. While it is true that the assent of the executor is necessary to vest the legatee with the legal title to the legacy, when such assent is given it relates back to the will, and that instrument determines the rights of the legatee.—8 Port. 529. The will in this case gave Mrs. Sprague a contract separate estate, and no act of the executor or any one else could impose conditions not in the will, or vary her tenure as declared therein.

BRICKELL, C. J.—The bill is filed to foreclose a mortgage, executed by husband and wife, conveying the wife's real estate, to secure the payment of a debt contracted by them during coverture. The argument in support of the demurrer to the bill, so far as the demurrer is now insisted upon, is, that the averments of the bill, do not state with certainty, whether the estate of the wife in the lands, was her equitable, or her statutory separate estate—the wife having capacity, if her estate was equitable, and her power of alienation was not limited by the terms of the instrument creating it, to execute the mortgage—but if her estate was statutory, she was without that capacity.

The general rule of the common law, applicable alike in courts of equity, and courts of law, is, that a wife can enter into no contract binding her personally, and can make no sales, gifts, transfers, or conveyances of property real or personal. In courts of equity, an exception was, and is recognized, in reference to property held to her sole and separate use. As to such property, that court has long recognized

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her capacity to contract, her contracts not binding her personally, but imposing a charge on the property, the court enforces. Not only does the court recognize her capacity to charge, but her power to alienate as if she were a *feme sole*; her power to charge or alienate not being limited by the instrument creating the estate. It is an elementary, or as is said in *Duckworth v. Duckworth*, 35 Ala. 70, a cardinal rule of equity pleading, "that a bill must show the complainant's claim or title to relief with accuracy and clearness, and with such certainty that the defendant may be distinctly informed of the nature of the case which he is called on to meet; matters essential to the complainant's right to relief must appear, not by inference, but by direct and unambiguous averment." A bill to enforce the contract of a married woman, or a right derived from her alienation, will not show with accuracy and clearness, a claim or title to relief, unless it shows the property to be bound by the contract, or which is claimed by the alienation. The separate estate which a court of equity recognizes, and recognizes the power of the wife to charge by her contracts, or to dispose of as if she were a *feme sole*, when it consists of lands, must be created or declared by writing; by deed, devise, marriage settlement, or other appropriate instrument. The bill must not only describe the property, but it must also show the capacity of the wife to charge or convey it. This can be shown only by stating the deed or other instrument conferring the capacity. It is not necessary to set it out in *haec verba*, but its substance must be shown, that the court may determine whether the capacity to make the contract, or enter into the alienation is conferred.—*McDonald v. Mobile Life Ins. Co.*, 56 Ala. 468; *Winter v. Quarles*, 43 Ala. 692; *Reel v. Overall*, 39 Ala. 138; *Cowles v. Morgan*, 34 Ala. 435.

The averments of the present bill are not sufficient to satisfy this rule. They show no more than that the lands were conveyed to a trustee for Mrs. Sprague, and that she held them *as her separate estate by contract, and that she had a right to, and in this equitable court did bind the same, for the payment of said debts, &c.* The interposition of a trustee, in whom the legal estate resided, does not necessarily create an equitable separate estate. Whether such estate was created, would depend upon the terms of the trust—whether it was expressed to be for the sole and separate use of the wife, excluding all marital right of the husband.—*Lenoir v. Rainey*, 15 Ala. 667; *Short v. Battle*, 52 Ala. 456. The manner in which Mrs. Sprague held the

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lands, could not change the character of her title. The remainder of the averment, is simply the conclusion of the pleader, not the statement of facts showing the capacity of Mrs. Sprague.—*Cockrell v. Gurley*, 26 Ala. 405. The demurrer, consequently ought to have been sustained. An amendment may cure this defect in the bill, if the facts warrant it. We proceed therefore, to inquire whether the estate of Mrs. Sprague, in the lands, is her equitable separate estate, which she could alienate by mortgage, as a security for the debt contracted by her and her husband.

It is conceded the deed from Pope and others, to Hunter as trustee, by its terms created an equitable separate estate, which Mrs. Sprague, had the capacity of a *feme sole*, to alienate or charge. Whatever may be the operation, if any, on after acquired property, of the settlement into which she and her husband entered on the eve of marriage, that settlement can not affect, limit, or qualify the estate taken by her under the conveyance from Pope and others. The estate was derived from the bequest in the will of her father, and is subject to the trusts he imposed in that bequest, and not to the trusts and stipulations of the prior marriage settlement, to which he may have been unwilling to subject it. When a father or other person, makes a gift for the use of a married woman, he may, if he offends no law, impose whatever limitations or impart whatever qualities and incidents he chooses, to the estate he creates.—1 Bishop on Married Women, § 797; *Short v. Battle*, 52 Ala. 456. No particular language, no particular form of expression, no technical words, are necessary to the creation of an equitable separate estate of a married woman. It is enough that from the terms of the instrument, it clearly and unequivocally appears, that the gift is to her separate use, excluding the marital rights of the husband. The gift in the will of Mrs. Sprague's father, is of a third of the valuation of certain slaves, which when realized, "is to go into the hands of John S. Hunter, as trustee of Elizabeth Sprague, for her use and behoof, and no other." It is impossible to doubt the intent of the testator, was the creation of a trust for the sole and separate use of his daughter, excluding the husband and all others from participation in its benefits, or from power to control and direct the appropriation of the money bequeathed. When the trustee, with the consent of Mrs. Sprague, (and that consent must be presumed from her continuous occupancy of the premises, for more than twenty years, claiming under the deed) invested the money realized

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in the purchase of real estate, it was his duty, to which a court of equity would have compelled him, if he had not voluntarily performed it, to take a conveyance to himself, as trustee, of the legal estate; and that the same trusts should be declared, and impressed on his estate, as the testator had declared in the origin and creation of the trust. Neither by the terms of the bequest, nor by the terms of the deed conveying the premises to the trustee, is the power of Mrs. Sprague, to charge or alienate the estate, limited or restrained. She had capacity to alienate or charge it for the payment of her own debts, or debts contracted by her husband. The mortgage is therefore a valid security.

The defect in the bill, compels a reversal of the decree. Reversed and remanded.

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Trial of Right of Property.

1. *Demurrer; when rulings on, not revised.*—If rulings upon demurrer do not appear, otherwise than by recitals in the bill of exceptions, they will not be revised on error.

2. *Lien for advances to make crop.*—The crop-lien is created, when advances are made in compliance with the statute, and not by levy of the attachment, which is but process to enforce an existing lien,—while in ordinary attachments the lien does not begin until the levy; and hence, where property attached for advances is claimed, under a right or title ante-dating the levy, the advancer may recover under his crop-lien, if older than or superior to the right of the claimant, though such right accrued prior to the levy.

3. *Lien for advances; who can not enforce by attachment.*—The assignee of a note or obligation given for advances to make a crop, can not enforce the lien by attachment; the statute confers the right to that remedy upon the advancer alone.

4. *Trial of right of property; what confers sufficient title to maintain.* H. owed W. and gave him an instrument intended to create a lien for crop advances, but such was not its legal effect. W. obtained possession of a part of the crop from H. with his consent, to pay the debt with it, and sold to S.,—*held*: S. had such title or right of possession as would enable him to maintain a trial of the right of property.

5. *Lien for advances; what not entitled to.*—A note or other obligation acknowledging an indebtedness for advances to make a crop, &c., will not create a lien on the crop, if in fact the consideration of the note is a mere antecedent debt of the maker; and one not a party or privy to the instrument may contradict its recitals by parol, showing a different consideration from that recited.

6. *Introduction of evidence; what ruling as to, not revisable.*—It rests within the sound discretion of the court, to allow a party to introduce further

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evidence, even after the close of the argument; and the exercise of that discretion is not revisable.

APPEAL from Montgomery Circuit Court.

Tried before Hon. JAMES Q. SMITH.

Appellee, Carter, commenced suit by attachment in November, 1871, before a justice of the peace, to enforce a lien for advances to one Harvey, to enable him to make a crop for the year 1871. The attachment was levied on a bale of cotton in possession of and claimed by one Wilson, the appellant. The justice having decided that the cotton was subject to the attachment, an appeal was taken to the Circuit Court.

In that court Carter filed "an issue," which, after stating that the cotton levied on in the cause and claimed by Wilson is subject to the attachment, proceeds to state facts showing that said cotton is the property of said Harvey, and grown by him during the year 1871; that on the 19th day of April, 1871, Harvey obtained advances from Tatum & Wilkinson to enable him to make a crop for that year, and made and signed an instrument, properly executed and recorded five days afterwards, in terms which gave said Tatum & Wilkinson a statutory lien on the crops of Harvey; that on the 30th day of October, 1871, Tatum & Wilkinson for value received transferred, by endorsement in writing, the note or obligation of Harvey to said Carter, and the same is the cause of action on which the attachment was issued.

Wilson demurred to this issue, on the ground that it showed that the advances were made by Tatum & Wilkinson and not by Carter; also, because it showed that Carter had made no advances.

There is no judgment entry showing what was done with the demurrer, but the bill of exceptions recites that it was overruled, and the claimant excepted. The claimant then answered that the bale of cotton is not subject to the attachment; that said "Harvey on the 1st day of January, 1871, gave one Isaac Wade a written lien on his crop for the year 1871, purporting to be for advances made by said Wade to enable said Harvey to make the crop, which was duly recorded on the 3d day of February, 1871; that said Wade obtained possession of the cotton in controversy under said written lien from Harvey, and being so in possession sold and delivered the cotton to claimant, for a valuable consideration, before the levy of the attachment; that claimant had no notice, actual or constructive, of any lien in favor of Car-

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ter, and that the lien of Wade was prior to the title of Tatum & Wilkinson.

The execution of Harvey's note and mortgage to Tatum & Wilkinson, on the 19th day of April, 1871, and its recording within five days thereafter, was proved, as also that the consideration therein stated was the true consideration—being \$100 advanced by them to Harvey to enable him to make a crop the current year. It was also shown that the cotton in controversy was raised by Harvey during the year 1871, upon the lands in Montgomery county, mentioned in the mortgage, with the advances obtained from Tatum & Wilkinson.

Harvey on the first day of January, 1871, executed his note or obligation to Wade, for the sum of one hundred dollars, which attempted to recite, in the language of the statute, was obtained *bona fide* as an advance to enable him to make a crop, &c. This instrument was duly recorded on the 3d day of February, 1871. The court permitted Harvey to testify that advances to make a crop were no part of the consideration of this note, but that it was given in consideration of a debt Harvey contracted with third persons in the year 1869, and which Wade paid for him. Claimant objected to the admission of this testimony, on the ground that it contradicted the terms of the instrument, but his objection was overruled, and he excepted.

There was evidence tending to show that Wade, in the fall of 1871, obtained possession of the cotton by delivery from Harvey, in order to pay the debt the latter owed, and sold and delivered it to Wilson for value, before the levy.

This was substantially all the evidence up to this stage of the proceedings, and after the argument of counsel, the court charged the jury, among other things, "even if claimant purchased the cotton from Wade, such purchase would not convey any title to the claimant, unless it was shown that such sale was made under attachment sued out to enforce the alleged lien of Wade." The claimant, Wilson, duly excepted to this charge.

The claimant then asked the court to charge the jury as follows: "4. An advance lien attachment can only be sued out by the party actually making the advances; and if the jury believe from the evidence that Tatum & Wilkinson made the advances to Harvey, the jury must find for the claimant." The court refused this charge, and the claimant excepted.

After this, the court, at the request of the claimant, charged the jury that the burden of proof was on the plaintiff, to prove the issuance and levy of an advance lien attachment.

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The plaintiff then asked and obtained leave, against the objection and exception of the claimant, to introduce the attachment issued.

The jury found for the plaintiff, and claimant Wilson appeals.

The ruling upon demurrer, the charge given, and permitting plaintiff to introduce the attachment in evidence, are now assigned as error.

L. A. SHAVER, for appellant.—Carter had no lien which could be enforced by the statutory attachment.—*Foster v. Westmoreland*, 52 Ala. 223. Wilson could maintain this action, even if Harvey's obligation to Wade was ineffectual. *Carter v. Abraham*, 53 Ala. 8. These two cases show the error of the court below in the charges given and refused.

FITZPATRICK & RUGELY, *contra*.—The object of the legislature in the passage of the advance law was to encourage and aid planters in obtaining supplies and advances. More aid of this kind will be extended, if the advancer can readily dispose of his security—if his transferee takes the rights he had. The present statute is not near so restrictive as that giving the landlord a remedy by attachment. That statute said the *landlord* should have, &c.; implying a *personal* right. The act here considered, says the *advances* shall be a lien. In the one case the lien is incident to the *personal* relation; in the other, the lien is incident to the debt, the *advance*. The debt having been properly transferred in writing, the lien went with it. This view takes the case without the influence of the decision in *Foster v. Westmoreland*, 52 Ala. 223.

MANNING, J.—This was a trial of the right of property, for a bale of cotton seized under an attachment issued to enforce a crop-lien under the statute upon that subject. Appellee, Carter, was plaintiff in the attachment suit; one Harvey was defendant; and appellant, Wilson, claimed the cotton as his—and from the verdict and judgment adverse to his claim of ownership, he appealed to this court. The controversy is between him and the plaintiff in the attachment suit.

The assignment of the overruling of the demurrer of the claimant to the issue tendered by plaintiff upon the trial of the right of property, as an error, has no basis to rest upon in this transcript of the record of the Circuit Court. The

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recitals in a bill of exceptions, it has been several times ruled, can not be regarded by us as showing what *judgments* were rendered in that court. Its judgments upon demurrers to be valid, must be entered on the minutes of the court—the record it keeps of its daily proceeding. There is no copy in this transcript of any such minute entry of a judgment upon the demurrer. The correct practice, though in forming the issue upon a trial of the right of property, is that indicated by the statute. It was sufficient for plaintiff to allege, and better that the cotton attached was the property of defendant in the attachment, and liable to seizure under it. Under this he would be authorized to make proof of his crop-lien, and right to an attachment, if entitled thereto, by reason of the lien having been acquired for advances he had made.

As we said in *Boswell & Wooley v. Carlisle, Jones & Co.*, 55 Ala. 554, ordinarily, an attachment lien begins from the time of the seizure, or levy upon the property. But this is not true of a crop-lien which the process of attachment is used only *to enforce*. This lien began before the writ was issued—it was created by a compliance with the terms of the statute by force of which it exists. Hence, if a claimant of produce attached as subject to a crop-lien, prove a title and right of possession thereto, ante-dating the levy of the attachment, the plaintiff in the action must go back and produce evidence of his crop-lien which will show it to be older than, or superior to the right of the claimant, and a lien which he has a right, (in the language of the statute,) “to enforce,” by that writ.

The writ of attachment in this cause, sued out by Carter in November, 1871, was in that month levied upon the cotton in controversy as part of the crop made by Harvey in that year. But the cotton was then and before, in possession of claimant, Wilson, as a purchaser of it from one Wade. Wade asserted a right to it under an instrument made by Harvey, January 1st, 1871, which is set out as exhibit B, in the bill of exceptions, and was intended to create a crop-lien on Harvey's crop of 1871, but did not have that effect, both because not in proper form, and because not given to secure advance to enable Harvey to make a crop. It is capable though of operating as an equitable mortgage for the payment of the pre-existing debt which the instrument was made to secure. And if (as it was admitted he would testify,) Wade obtained the cotton from Harvey with the consent of the latter, to pay his debt with, this would

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give to Wade or to Wilson, the purchaser from him, such a possession and right of possession as would enable him to maintain his standing as a claimant in the statutory action of the "trial of the right of property," and put the plaintiff in the attachment to proof of his superior crop-lien, and of his right to enforce it, according to the statute, by attachment. In fact, the situation of Wilson would be very nearly the same as that of Carter was in the case of *Abraham v. Carter*, (53 Ala. 8), in which Carter was claimant, and where this court said: "The transfer of S. G. & W. to the claimant, of the statutory mortgage made by Williams, gave him in a court of equity, all the rights of his transferrors. When the mortgagor delivered to him the cotton which was the subject of the mortgage, this equity was coupled with possession, and gave him a title on which he could maintain trespass, detinue or trover against any one who should disturb his possession.—*Bryan v. Smith*, 22 Ala. 534. A trial of the right of property under the statute, is a cumulative remedy to these actions, and may when personal property is seized under legal process, be maintained whenever these actions would lie against the officers making the seizure."—See also, *Boswell v. Carlisle*, *supra*; and *Smith, Administrator, v. Brown, Administrator*, (in manuscript.)

In the present cause, therefore, Carter as plaintiff in the litigation, in making out his case, would be compelled to produce and rely upon the instrument executed by Harvey to Tatum & Wilkinson, and by them assigned to him, Carter. And this brings up the question, whether as their assignee, he succeeded to their right of suing out a writ of attachment, and by virtue of it, seizing the crop made by Harvey. In regard to this, we are not able to perceive that it differs from the like question in relation to the assignee of a rent-note given to a landlord, which arose in *Foster v. Westmoreland*, 52 Ala. 223. It was therein held that the extraordinary remedy by attachment allowed to the landlord could not be asserted by the assignee of the rent-note. We feel compelled to hold that the same ruling is applicable in the case of an assignee of a note or obligation creating a crop-lien. The law expressly provided (Revised Code, § 1860), that the person having such a lien, (meaning, as we understand—the person to whom it is given,) "shall have the same rights and remedies to enforce such lien as *landlords* have in this State, for the collection of rents." This enactment seems to make the decision in *Foster v. Westmoreland* the more applicable.

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According to the views above expressed, the circuit judge erred in his charge that—"even if claimant purchased the cotton from Isaac Wade, such purchase would not convey any title to claimant, unless it was shown that such sale was made under attachment sued out to enforce the alleged lien of said Wade." If the jury believed from the evidence that Harvey executed the instrument represented by Exhibit B., to secure payment of a debt he justly owed to Wade, and in September or October afterwards delivered the bale of cotton in controversy, a part of the crop made by him that year, to Wade, for him to sell and pay the debt due to him, and he sold it to Wilson,—these acts conferred upon Wilson a title which would enable him to maintain his claim in this action, against a plaintiff who was not entitled to have it taken from him by attachment.

The court would have erred also in refusing to give the charge marked 4 (6) if it was in writing when asked; which does not appear.

There was no error in allowing evidence that the instrument marked Exhibit B., was not executed to secure the repayment of money advanced to make a crop with. Carter or his assignors not being parties to it, had the right to prove its recitals to be false.

It was in the discretion of the court to permit the writ of attachment and sheriff's return thereon to be introduced in evidence before the retirement of the jury.

For the errors indicated the judgment of the Circuit Court must be reversed, and the cause be remanded.

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McGehee v. Owen.

Bill for Contribution, &c.

1. *Surety; what creates the relation of.*—Where parties desiring to purchase parts of a tract of land, of unequal quantities, but not unequal in value except as to the difference in quantity, procure one of them to purchase the entire tract in his name, they joining in the note for the purchase-money—all are jointly and severally bound as principals to the vendor; but as between themselves, each is principal only for the share of the purchase-money he was bound to pay, and a surety for the remainder.

2. *Contribution; right to.*—The right to contribution, where one dis-

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charges more than his just share of a common burden, does not necessarily arise from contract, but has its foundation in natural justice; the principle applies not only to the relation of principal and surety, but to that of original contractors, and whenever parties stand in a relation in which equality of burdens is equity between them.

3. *Same; right to share in benefits acquired by person bound to contribute to another.*—Wherever persons stand in such relation to a common burden, that contribution between them will be compelled, neither can speculate on the common liability, and whatever benefits or advantages are acquired by one in dealings with the common creditor, enure equally to the benefit of all.

4. *Same.*—A co-surety who gives his individual note to the common debtor, who accepts it in payment and compromise of the debt, is entitled to contribution from the other sureties for their *pro rata* share, though he afterwards became insolvent, and failed to pay the note to the common debtor.

5. *Contribution, delay in enforcing; when not bar to.*—Contribution may be refused to a surety, when his conduct has been such as to work injustice or injury to the principal or co-sureties; but when injury has not been produced by delay, and lapse of time has not worked a bar, mere passiveness in asserting his right, will not prejudice a claim to contribution.

APPEAL from Chancery Court of Lowndes.

Heard before Hon. H. AUSTILL.

The opinion states the case.

DAVID CLOPTON, for Owen.

ELMORE & GUNTER, for McGehee.

BRICKELL, C. J.—These are cross-appeals from a decree rendered by the court of chancery, in a cause wherein the appellant, Owen, was complainant in the original bill, and defendant in a cross-bill filed by the appellee, McGehee.

The purpose of the original bill is to compel contribution from McGehee, for the relief of Owen, who has discharged more of a common obligation than he was bound in equity and conscience to discharge, thereby benefitting McGehee. The facts as shown by the pleadings and proof are, that in December, 1859, the personal representatives of Haley Hutchinson, under an order of the court of probate of Lowndes county, exposed to public sale, a large tract of land, containing more than fourteen hundred acres. Owen, McGehee, Watts, and Harrison, each desired to purchase parts of the lands, of unequal quantities, neither desiring to purchase the entire tract. On the day of, and at the place of sale, it was agreed that Owen should in his own name bid off the entire tract, and the others would join him in the note for the purchase-money. Each one was to take the part and quantity of the lands he wished, and was to pay a corresponding part

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of the purchase-money. The lands were bid off by Owen, at the aggregate sum of 35,459 66-100 dollars, being 25 25-100 dollars per acre, and the note of himself, McGehee, Watts and Harrison, was given payable to the administrators on the first day of January, 1861, with interest from the first day of January, 1860. Owen was by the administrators reported to the court of probate as the purchaser, and the sale to him confirmed by the court. Immediately Owen entered into possession of 434 27-100 acres of the land, the part and quantity he desired to purchase. McGehee took possession of 568 45-100 acres, the part and quantity he wished. Watts of 240, 36-100 acres, and Harrison of 160, 75-100 acres. Some time after the sale, and after each party had taken possession of the lands he desired to purchase, in the spring of 1869, a dispute arose between McGehee and Owen, as to the amount of the purchase-money each should pay. McGehee insisted his part of the lands was less valuable than the parts of the others, and that the agreement was that the lands were to be valued, and each should pay according to the relative value of his lands as compared to the whole. The result of this dispute was that on the 27th of July, 1860, Watts verbally, and without any new consideration, agreed that for his part of the lands he would pay five dollars per acre more than the price per acre at which Owen bid off the lands; and Owen and McGehee agreed in writing, that Watts' part of the land being valued at this increased price, two persons whom they nominated, should make valuation of their parts of the land, and determine the amount of the purchase-money McGehee should pay. This agreement was left in the possession of Watts and was never executed—the valuation was not made by the persons named—from what cause does not appear. At some other time, but when, it does not appear, another agreement in writing was entered into by Owen, McGehee and Harrison, by which it was agreed that appraisers, whom they selected, should value their respective parts of the land, and that each one should pay of the purchase-money according to the valuation. These appraisers determined each one should pay the purchase-money of the parts of the lands he had taken. On the seventh day of May, 1862, Owen paid on the note for the purchase-money of the lands \$6,500; on the 19th June, 1862, \$13,500; on the 31st March, 1865, \$5,041 61-100, making in the aggregate, \$25,041 61-100. On the 20th December, 1862, McGehee paid on the note, \$10,000, and on the 11th of June, 1863, the further sum of \$900, leaving a balance due on the

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note of \$8,859 72-100 on that day. The note by assignment of the administrators of Hutchinson passed into the possession of administrators of one Shepherd, and one Slater subsequently became possessed thereof. McGehee having advised with counsel, having some doubt as to whether he could safely deal with Slater as the owner of the note, and being advised that he could, entered into negotiations by which he obtained the note, paying three thousand dollars in cash, stock of a railroad company, of the nominal value of fifteen hundred dollars. This note he has not paid; but judgment thereon has been obtained, execution returned no property found, and he is now insolvent. The amount due on the original note for the purchase-money of the lands, on the first of June, 1856, when McGehee by this transaction obtained it was \$9,733 24-100. At this time Owen was also negotiating with Slater for the note. There is a conflict in his testimony and that of McGehee, as to whether he refused to join the latter in taking up the note. McGehee was subsequently involved in litigation with one Sutherlin, who claimed some right or interest in the note, as to the validity of the transaction with Slater; and he and Owen were both involved in litigation with the heirs of Hutchinson, as to the validity of the title to the lands. In this litigation, however, they were successful.

Watts and Harrison each failed to pay any part of the purchase-money of the lands, and in 1867, surrendered to Owen the parts of the lands they had taken, whereby as between himself and McGehee, Owen became bound for their parts of the purchase-money. The questions at issue, between the parties, are, *first*, whether Owen shall account for Watts' part of the lands, at the increased price he agreed to pay, or only at the same rate per acre at which the whole lands were originally purchased; and, *second*, whether McGehee can claim the whole amount due on the original note, when he obtained it from Slater; or only the amount he paid in money, and the actual value of the railroad stock; *third*, whether the note for fifteen hundred dollars given by him to Slater, which is unpaid, shall as between Owen and himself, be computed a payment.

The chancellor directed a reference to the register to state an account between the parties, on each hypothesis, and a report was made to which each party filed exceptions. Pending these exceptions, the parties agreed that the register should report, and he did report, that assuming McGehee was entitled to a credit for the balance due on the original

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note for the purchase-money of the lands, on the first day of June, 1866, when he acquired it from Slater, Owen would stand indebted to him on that day \$670 54-100, and computing interest to the day of the agreement and report, May 7th, 1877, it would be \$1,257 19-100. On the hypothesis that McGehee was entitled to a credit only for the cash paid, the actual value of the railroad stock, and his note for fifteen hundred dollars as cash, he would then be indebted to Owen in the sum of \$2,248 51-100 on June first, 1866, and computing interest up to May seventh, 1877, \$4,215 72-100.

The chancellor was of opinion, that under all the facts of the case, Owen had too long delayed his claim for contribution, and the right to participate in the benefits of the transaction by which McGehee obtained the original note from Slater, and rendered a decree dismissing the original and the cross-bill. The original bill was filed on November 17th, 1875. The litigation with the heirs of Hutchinson was not then finally determined. Each party has appealed and assigned errors.

There is no evidence that there was any inequality in the values of the several parcels of the tract of land, further than may arise from the difference in quantity. Assuming for the present that there was no agreement between the parties as to the amount of the purchase-money each should pay, the implication of the law would be, that each should pay such a portion, as his part of the land bore to the price of the whole tract; or, assuming there was an agreement the respective parcels should be valued, and each should pay the valuation of his part; or that there was an express agreement that each should pay of the purchase-money according to the quantity of his parcel, will not vary the relations subsisting between the parties. A joint note having been given to the vendors for the purchase-money, as to them, all the makers were jointly and severally bound for its entire amount; all were principal debtors. But as between the makers, each was a principal for the share of the purchase-money he was bound to pay, and a surety for the remainder.—*Brandt on Suretyship*, § 250; *Deitzler v. Michler*, 37 Penn. State, 82; *Stokes v. Hodges*, 11 Rich. Eq. 135; *Hall v. Hall*, 34 Ind. 314; *Crafts v. Mott*, 4 Coms. 603; *Chipman v. Morrill*, 20 Cal. 130; *Goodall v. Wentworth*, 20 Maine, 322; *Fletcher v. Grover*, 11 N. H. 368.

Standing in this relation to each other, there can be no doubt, if McGehee or Owen, either, paid more than his share of the purchase-money, more than as a principal to the other

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he was bound to pay, he has a just claim for contribution. The claim or right does not depend on contract. There was a community of burthen for all the purchase-money beyond the amount each was bound to the other to pay as a principal. It is a principle of equity, having its foundation in natural justice, that when one discharges more than his just portion of a common burthen, another who received the benefit ought to refund to him a rateable proportion. The principle applies not only to the relation of principal and surety, but to that of original co-contractors, and whenever parties stand in a relation in which equality of burthen is equity between them—when one ought not to bear the burthen in ease of the others, “as all are equally bound and are equally released,” says Judge STORY, “it seems but just that in such a case all should contribute in proportion toward a benefit obtained by all, upon the maxim *qui sentit commodum sentire debet et onus*, and the doctrine has an equal foundation in morals, since no one ought to profit by another’s loss when he himself has incurred a like responsibility. Any other rule would put it in the power of the creditor to select his own victim, and upon motives of mere caprice or favoritism, to make a common burden a most gross personal oppression.”—1 Sto. Eq. § 493.

What may have been the original agreement between the parties, as to the amount of the purchase-money each should pay for the parcel of land taken by him, it is not material to inquire. If it was variant from the subsequent agreements, it was competent for them to alter or modify it subsequently. The agreement by which Owen, McGehee and Harrison submitted to appraisement their respective parcels of the land, with the view of determining the proportion of the purchase-money each should pay, and the award of the appraisers, that the lands of each were of the same value according to the quantity, and each should pay off the purchase-money on that basis, fixed the amount each was bound as principal to pay. When the award of the appraisers is read and construed in connection with the agreement, this is its only fair and legitimate meaning; and if it were not, in the absence of all evidence that there was any inequality of value in the several parcels, and of all evidence of an express agreement that the parties should pay in any other proportion, there could be no equality of burthen between them, on any other basis.

The agreement by Watts to pay a greater price per acre, for his parcel of the lands, than that to be paid for the entire tract, was not perhaps offensive to the statute of frauds, and

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may have been binding on him. His whole agreement was in parol, and could be waived or modified by parol.—1 Chit. Con. 155. If he had paid of the purchase-money, according to this agreement, the payment would have enured to the equal benefit of the other parties. But not having paid any part of the purchase-money, and the others standing as his sureties, not for the payment of the purchase-money, according to this subsequent agreement, but according to the quantity of his parcel of land, at the original price, it is not equitable that McGehee should claim that Owen should account for Watts' parcel at such increased price. The evidence does not disclose that it was of any greater value than the other parcels. When he surrendered it to Owen, it was a payment or security operating to the benefit of McGehee and Harrison as his co-sureties with Owen. It is not insisted that there was any agreement that Owen should take the land at the increased price Watts agreed to pay, or in any other manner than as relieving all from that portion of the common burthen Watts ought to have borne, and for which they stood in the relation of his sureties. All that McGehee can equitably claim from Owen, is full indemnity against the liability he had assumed for Watts, and this is afforded him, when he is not required to pay any part of the purchase-money Watts was originally bound to pay. It was never contemplated by either of them to become bound as a surety one to the other, and to Harrison, for the price of the lands Watts by his agreement subsequent to the purchase, promised to pay. If the lands had been of the value Watts agreed subsequently to pay, profiting Owen to that extent, Owen would have been bound to account for it at that value; but that fact not appearing, the equities of the parties are fully satisfied, when the lands are applied to relieve them from their common liability for Watts.

It is undisputed, that prior to the arrangement by which McGehee acquired the note from Slater, Owens' payments were largely in excess of his proportion of the common debt, including as parts of his liability the proportions of Watts and Harrison for which he became liable by taking their several parcels of the land. It is well established, that a surety can not speculate on the common liability of himself and his co-sureties. Whatever of advantages he may acquire in his dealings with the common creditor, enure like securities for the common debt, to the common benefit. It is as unjust, to compel a surety to bear more than his just proportion of the actual, necessary loss, as it is to compel

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him to bear the whole burthen of the common debt.—*Blow v. Maynard*, 2 Leigh, 29; *Tarr v. Ravenscroft*, 12 Grat. 642; *Stallworth v. Preslar*, 34 Ala. 505; *Brandt, Suretyship*, § 250.

McGehee is not entitled to claim of Owen the whole amount of the balance due on the note, when he acquired it from Slater, but simply the amount he really paid. The dealings between him and Slater, was on the footing that the ultimate collection of the claim was doubtful, or could be indefinitely procrastinated, if there was a resort to legal remedies. The railroad stock was not employed in the payment as of its nominal value, but it was accepted as part of the compromise, into which Slater and McGehee entered. This being true, McGehee can not claim that he shall be allowed more for the stock than its real value.—*Brandt on Suretyship*, § 250. The note of McGehee, though he has not paid it, operated and was received as a payment of the common debt, and entitles him to contribution from Owen, as if it had been money.—*Brandt on Suretyship*, § 249; *Pinkston v. Taliaferro*, 9 Ala. 547.

The delay of Owen in asserting his claim for contribution is fully accounted for by the litigation in which he and McGehee were involved in reference to the land, if there was a necessity for accounting for it. Contribution may be refused a surety when his conduct has been such as to work injury or injustice to the principal, or to his co-sureties. But mere passiveness in asserting his rights, unless the lapse of time works a bar; a mere want of diligence, can not prejudice him.

In this view of the rights of the parties, they have agreed the balance due Owen from McGehee on the seventh of May, 1877, was \$4,215 72-100. The legal title to the lands resides in Owen, and the debt is a lien chargeable on them.

The decree of the chancellor in 576 dismissing the cross-bill must be affirmed. The decree in 575 must be reversed, and the proper decree will be here rendered.

STONE, J., not sitting, having been of counsel.

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Jacobs v. State.

Indictment for Perjury.

1. *Writ of seizure; when justice may issue.*—A justice of the peace, after exacting proper affidavit and bond in a *detinue* suit, has jurisdiction, dependent upon the value of the property, to issue a writ of seizure.

2. *Perjury; what necessary to constitute.*—The materiality to the issue or point of inquiry, which is necessary to constitute perjury, is not confined to matters involved in issues of fact formed during the course of the proceedings, or where the affidavit can be used as evidence on the trial of such issues; it is enough, if the matter falsely sworn to, is material to the point of inquiry at the time it is made.

3. *Same; what sufficient to constitute.*—A plaintiff in an action of *detinue*, who is without right or title which will support the action, and who wilfully and corruptly swears falsely to an affidavit of ownership, thereby procuring an order of seizure from the officer issuing the summons, is guilty of legal perjury; such affidavit, though purely cautionary, and incapable of being used as evidence at any subsequent stage of the proceedings, is material to the point of inquiry at the time it was made, and tends to the abuse of the administration of justice.

4. *Same; what indictment for must show.*—Although our statute has dispensed with many of the allegations necessary in a common law indictment for perjury, it still requires, in addition to the general averment of authority to administer the oath, that the indictment should set forth the substance of the proceedings, that it may distinctly appear that the oath was taken on an occasion, in reference to a matter, and before an officer, or court, having authority to administer it; an indictment not setting out enough of the proceedings to disclose these facts, is insufficient: so also, if it sets out the proceedings, and does not disclose that the oath was lawfully taken.

5. *Misnomer; when fatal to conviction.*—The names of the parties to a judicial proceeding, in which the false oath was taken, must be correctly stated, that the proceedings may be accurately identified; and if not correctly stated, the variance is fatal—as where the suit described in the indictment was against *Cobbs*, and that of which the evidence was given was against *Cobb*.

APPEAL from Montgomery City Court.

Tried before Hon. JOHN A. MINNIS.

The appellant, Isaac Jacobs, was convicted of perjury, on an indictment which charged that Jacobs, “in making an affidavit in an action of *detinue* for the recovery of a yoke of oxen and an ox cart, before John C. Hardwick, a justice of the peace in and for Montgomery county, and State of Alabama, in which I. Jacobs was plaintiff, and C. A. Cobbs was defendant, being duly sworn by the said John C. Hardwick, justice of the peace, &c., who had authority to administer such oath, falsely swore as follows, to-wit:”

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"The State of Alabama, county of Montgomery. Before me, John C. Hardwick, a justice of the peace in and for said county, personally appeared I. Jacobs, who being duly sworn, deposeth and saith, that the property sued for in the complaint of I. Jacobs, to-wit, one yoke of oxen and one ox cart belongs to I. Jacobs, the said plaintiff.

"I. JACOBS."

"Sworn to and subscribed before me this, 11th day of June, 1878. JOHN C. HARDWICK, J. P."

"The matter so sworn to being material, and the oath of the said Isaac Jacobs in relation to such matters being wilfully and corruptly false,—in this, that said property did not belong to Isaac Jacobs, but was the property of Jacobs & Carter, a firm composed of Isaac Jacobs and David H. Carter, against the peace," &c.

On the trial, it was proved that on the 11th day of June, 1878, defendant made the affidavit set out in the indictment, in an action of *detinue* commenced by him against one C. A. Cobb, and there was evidence tending to show that he made it for the purpose of securing a writ of seizure of the property sued for. It was also shown that prior to that time, to-wit, on the sixth day of June, 1878, one W. D. Carter obtained a judgment against the firm of Jacobs & Carter, (of which firm the defendant was a member) and that an execution issued thereon had been levied on the property, as partnership property, and that the constable who made the levy, appointed said Cobb bailee, and left the property in his possession as such. It was also shown, that one Shular had the oxen in his possession, and was bringing them to Montgomery to deliver to the defendant; that they gave out on the way, and he left them with the said C. A. Cobb to rest, and that while said property was in Cobb's possession, he was notified by D. H. Carter, a member of the firm of Jacobs & Carter, not to deliver said property to the defendant, but to hold it subject to his (Carter's) orders, and that in consequence of this notice, the said Cobb did, on the seventh day of June, 1878, and prior to the levy, refuse to deliver the property to Jacobs on demand, and that afterwards, on the 11th day of June, 1878, the defendant commenced the *detinue* suit before J. C. Hardwick, and made the affidavit set out in the indictment. There was evidence tending to show that Jacobs purchased the property himself, and after the purchase charged the firm therewith. It was also shown that prior to the making of the affidavit on which the perjury was assigned, Jacobs in a proceeding before an United States

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commissioner, had made affidavit that this identical property was the property of the firm. This was substantially all the evidence.

The defendant, among other charges, requested the following written charge, to-wit: "If the evidence shows that the action brought before Justice Hardwick was against C. A. Cobb, and the indictment alleges that it was C. A. Cobbs, then the defendant can not be found guilty under this indictment." The court refused to give this charge, and the defendant excepted.

The jury having returned a verdict of "guilty as charged," the defendant moved in arrest of judgment, on the following grounds:

"1. Because the indictment charges no offense known to the law.

"2. Because said indictment fails to show that defendant had no right to make the affidavit upon which the perjury is assigned.

"3. Because said indictment fails to show that the oath assigned as perjury was relevant to any issue in any judicial proceedings; or that any judicial action was taken thereon.

"4. Because said indictment, by its own allegations, shows that defendant had the right to make the oath, upon which the perjury is assigned."

This motion was overruled, and the defendant sentenced to two years hard labor for the county. The refusal to give the charge requested, and the overruling of the motion in arrest of judgment, are now assigned as error.

J. S., and JOHN GINDRAT WINTER, for appellant.—The oath was immaterial to any issue in the case, and can not be the subject of perjury. Its only purpose and effect was to procure an order of seizure, and the order being made, the affidavit had served its purpose and was *functus officio*. It was never evidence of any fact; and the justice would be compelled to issue the writ of seizure if the statutory bond and affidavit were made, even though he knew that the oath was false, from beginning to end. In granting the order of seizure, the justice did not act judicially, but ministerially. There was not and could not be any judicial action, based on this affidavit; its truth, in no sense, promoting the object for which it was taken, and its falsity in no respect hindering it. The oath is without the essential element of materiality, and can not support an indictment for perjury. Again: the indictment charges that the property belonged to Jacobs

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& Carter, a firm of which the defendant was a member. Each partner is entitled to the exclusive possession of the partnership property, as against a stranger, which Cobbs certainly was in this case; and either could bring a suit to obtain, or could defend the possession. The affidavit defendant made, and on which the perjury is assigned, could be made by a mere bailee; and in this case, Jacobs did own the whole property, subject to the equal ownership of his partner.—See *Crosswell v. Lehman, Durr & Co.*, 54 Ala. 366. The fourth charge should have been given. The names Cobb and Cobbs are not *idem sonans*, and the variance is material.—See *Lyons v. State*, 5 Port. 236; *Humphrey v. Whitten*, 17 Ala. 30.

H. C. TOMPKINS, Attorney-General, *contra*.—The indictment clearly shows that there was a pending suit for the specific property mentioned therein, and that the oath taken was one authorized by law. It is not necessary that the indictment should show, wherein or how the matter sworn to was material; it is sufficient to charge generally that it was material.—2 Whart. Crim. Law, § 2263, and authorities cited; 2 Bish. Con. Pr. §§ 854 and 855. Wherever the law exacts an oath as a condition precedent to the granting of an order or writ, that oath is material; and perjury may be committed in taking the oath, if wilfully and corruptly false.

BRICKELL, C. J.—1. Justices of the peace have jurisdiction of actions of detinue, dependent on the value of the property in controversy. When an action of detinue is instituted in the circuit court, the plaintiff on making affidavit that the property sued for belongs to him, and the execution of a bond with surety, for the payment of all such costs and damages as the defendant may sustain from the wrongful suit, can obtain an order directing the officer executing the summons, to take possession of the property.—Code of 1876, § 2942. Statutory provisions regulating civil suits in the circuit court, so far as applicable, are declared in full force as to the rights of parties and to suits before justices of the peace. The purposes of the statute—the security and preservation of the property, pending the suit for its recovery, so that it may be forthcoming to answer the judgment, or the successful party indemnified against injury from its conversion or loss, extend with like force to an action of detinue before a justice, as to the action when commenced in the circuit court. While some of its provisions may seem to

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indicate that it was designed to be limited to suits in the circuit court, yet it is capable of a just application to suits before justices, and such application, renders the jurisdiction of the justice more beneficial to suitors. We, therefore, regard it as a *regulation of suit*, falling within the operation of section 3662 of the Code.

2. The affidavit, the plaintiff in an action of detinue is required to make, serves its purpose, when the order of seizure is made. It is purely *cautionary*—a pledge of good faith in the commencement of the suit, required to prevent an abuse of the extraordinary power to disturb and displace the possession of the defendant, before he has had the opportunity of being heard in defense of it, and before judgment pronouncing it wrongful. When the order is made, the force of the affidavit is exhausted, and it is not evidence in any subsequent stage of the suit. To constitute indictable perjury, the matter or thing sworn to, must be material to the issue, or to the point of inquiry. The *materiality* is not, as is argued by the counsel for the appellant, confined, when the oath is taken in a judicial proceeding, to matters which are involved in the issues of fact formed during the course of the proceeding. Nor is it essential that the affidavit should be capable of being used as evidence on the trial of such issues. It is enough, that the matter falsely sworn to, is material to the point of inquiry, at the time it was made. Oaths are of frequent necessity at the commencement, or during the progress of judicial proceedings, which are matters of evidence only to procure the exercise of some particular power from the court, or from some officer charged with the exercise of power, and which can exert no influence on the final judgment, or in any subsequent stage of the proceeding. Thus, formerly an affidavit to hold a defendant in a civil case to bail, may have been false, and may have been made at the commencement, or pending the suit; or bail may falsely swear, or others may falsely swear as to their sufficiency; or an affidavit may be falsely made to procure a writ of arrest, or as foundation for proceedings to compel another to keep the peace. The force of the false oath, as matter of evidence, is exhausted, when the point of inquiry is determined. Yet in each case, the essential quality of indictable perjury, *materiality to the point of inquiry*, exists.—Hawkins, book 1, chapter 69; *Pratt v. Price*, 11 Wend. 127; *State v. Johnson*, 7 Blackf. 49; *White v. State*, 1 S. & M. 149. All such false oaths tend to the abuse of the administration of justice, and are indictable perjuries, though not affecting the

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principal judgment to be rendered in the cause. A plaintiff in an action of detinue, who is without right or title which will support the action, and who wilfully and corruptly swears falsely to an affidavit of ownership, thereby procuring an order of seizure from the officer issuing the summons,—an order the officer can not withhold, if the plaintiff also executes a proper bond, is guilty of legal perjury.

3. It is said by Mr. Chitty, that “in former times, indictments for perjury were exceedingly prolix and dangerous.” And it seems certain that at common law, it was deemed necessary the indictment should with great particularity set forth the proceeding in which the oath was taken, and the character and jurisdiction of the court or officer administering it. Prosecutions for the offense were embarrassed by this particularity, and as is recited in the preamble to the act of 23 Geo. 2, c. 11, § 3, sometimes thereby the guilty were enabled to escape unpunished.—2 Russ. Cr. 621; 2 Bish. Cr. Pr. § 901. The evil, it was the purpose of that act to remove; and it dispensed with the necessity of setting out in the indictment the pleadings, or any part of the record or proceedings, or the commission or authority of the court or person before whom the perjury was committed; declaring it sufficient to set forth the substance of the offense charged upon the defendant, and by what court, or before whom the oath or affirmation was taken, averring such court or such person or persons had competent authority to administer the same, with proper averments to falsify the matter or matters wherein perjury was assigned. This act was adopted in terms by the territorial legislature in 1807, (Aik. Dig. 118, § 22;) and it was part of the Penal Code of 1841, (Clay’s Dig. 445, § 35.) The present statute is not materially variant, and reads: “In an indictment for perjury, or subornation of perjury, it is not necessary to set forth the pleadings, record, or proceedings, with which the false oath is connected, nor the commission or authority of the court or person before whom the perjury was committed; it is sufficient to state the substance of the proceedings, the name of the court or officer before whom the oath was taken, and that such court or officer had authority to administer it, with the necessary allegations of the falsity of the matter on which the perjury is assigned.”—Code of 1876, § 4813. It is said by Judge Gaston, the principal effect of the act of 23 Geo. 2, “was to substitute in the indictment the general averment of a competent authority to administer the oath, in the place of a specific averment of the facts, showing such authority,

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and to make the question, whether the oath was or was not taken before a competent jurisdiction, a compound question of fact and law, to be decided by the petit jury under the advice of the court.”—*State v. Gallimore*, 2 Ired. 375-6. Under the present statute, a general averment of authority to administer the oath is sufficient. In addition to this general averment, the indictment must set forth the *substance of the proceedings*, that it may distinctly appear the oath was not extra-judicial—that it was taken on an occasion, in reference to a fact material, and before a court or officer having authority to administer it; when if false, it is the subject of legal perjury. An indictment not setting out enough of the proceedings to disclose these facts, is not sufficient under the statute. Or if it sets out the proceedings, and does not disclose the oath was lawfully administered, it is insufficient.

The present indictment avers only that the appellant had commenced an action of detinue before a justice of the peace, and had made affidavit of his ownership of the chattels sued for, which is averred to be false. The purpose of making the affidavit is not shown, nor is it shown that it was used, or attempted to be used in the course of the suit. The affidavit was not authorized by law, unless the appellant had applied for an order of seizure of the chattels. If no such application was made or no such order obtained, the affidavit was extra judicial, the justice was without authority to take it, and it is not the subject of indictable perjury.—*People v. Fox*, 25 Mich. 492; *People v. Gaige*, 26 Mich. 30. The allegations of the indictment may be true, and the affidavit may have been improperly extorted by the justice as a condition on which he would entertain the suit, and issue process for the appearance of the defendant. Or, it may have been ignorantly made, to be used as evidence on behalf of the appellant on the final trial before the justice. There must be an oath authorized by law, and the indictment must show it affirmatively. It does not appear from the present indictment, that the justice had authority to administer the affidavit, and it could only be made to appear, by the averment that the appellant had applied for an order of seizure under the statute. If such application and order of seizure was made, the substance of the proceedings are not stated, and the indictment is not in conformity to the statute.

4. The occasion of administering the oath must be correctly stated in the indictment. The proceeding, if judicial, in which it was administered must be accurately described, so that it is capable of being identified.—2 Chit. Cr. Law,

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307. The names of the parties to the proceeding, are essential to its identity, and if incorrectly stated, the variance is fatal to the prosecution. The suit described in the indictment was against *Cobbs*, while that of which evidence was given, was against *Cobb*. The names are not *idem sonans*. *Humphrey v. Whitten*, 17 Ala. 30. The appellant was entitled to the fourth charge requested.

We do not deem it necessary in the present state of the record, to consider any other question which the case may involve. If they should arise again, it will be probably in a different mode. The judgment must be reversed and the cause remanded. The prisoner will remain in custody until discharged by due course of law.

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Garnishment.

1. *Misnomer; when not available.*—Misnomer of a party, if not pleaded, is waived, and when it is necessary to plead the judgment, the real party may connect himself with it, by averment of his proper name,—a garnishee can not abate the proceeding against him for want of correspondence between the name of the plaintiff in the garnishment and in the judgment.

2. *Stockholder; when can not withdraw subscription, or deny corporate existence.*—A subscriber to the capital stock of a bank incorporated by act of the legislature, (which makes the stock a fund pledged for the security of depositors,) upon condition that certain amendments shall be procured from the legislature, and who does not participate actively in an organization then made by the subscribers, with a view to the more easy attainment of the desired amendment, but after the failure to obtain it, pays up a portion of the subscription taking a receipt purporting to be the act of the bank, and signed by the cashier, for so much paid on the subscription, and makes no objection to the subsequent carrying on of business by the bank, though it was done with his knowledge, must be regarded as yielding assent to the provisions of the charter, and acquiescing in the organization, and can not withdraw such assent, to the prejudice of a depositor whose rights had already attached, nor to the prejudice of the corporation through whom the right may be enforced, after judgment, by garnishment; and besides having dealt and contracted with the corporation as such, such subscriber is estopped to deny its corporate existence.

3. *Usurpation of franchise; who can not complain of.*—Whenever there is a legislative grant, under which corporate existence and power claimed could be rightly exercised, no private individual can intervene in a collateral proceeding to complain of a breach of the conditions of the grant, or a usurpation of such franchises. The State which alone can create, may waive the breach or acquiesce in the usurpation, and the wrong being to the State, and not to the individuals, so long as the State remains inactive, the individual must also acquiesce.

4. *Same.*—The failure of a corporation to organize for more than two

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years after its incorporation, or to procure and have paid up the minimum amount of capital stock prescribed, before it was authorized to exercise corporate powers, is a wrong to the State, in which it may acquiesce or which it may waive, and the State remaining inactive, a private individual can not complain; and the corporation itself incurs all its liabilities and is estopped from denying them. (*Per* BRICKELL, C. J.; STONE, J., *not sitting*, and MANNING, J., *expressing no opinion on points decided in third and fourth head-notes.*)

APPEAL from Montgomery City Court.

Tried before Hon. JOHN A. MINNIS.

This was a garnishment sued out by the appellee, Mrs. Margaret Warner, against the appellants, Lehman, Durr & Co., as stockholders of "The Alabama Savings Bank of Montgomery," against which the appellee, in the name of Margaret Warren, had, at the July term, 1875, of the City Court of Montgomery, recovered judgment, on which execution had been duly returned, "no property."

The affidavit made for garnishment commences as follows:

"State of Alabama, Montgomery county. Personally appeared before, E. H. Metcalf, clerk of the City Court of Montgomery, John W. Watts, attorney for Margaret Warren *alias* Warner, who having been duly sworn, deposes that he was and is one of the attorneys for the plaintiff, in the case in said City Court of Margaret Warren in the body of the writ, and Margaret Warner on the back of said summons, against the Alabama Savings Bank of Montgomery," &c.

The affidavit then states that in the suit above mentioned, the plaintiff recovered a judgment; that execution was regularly issued thereon, and returned "no property," and that Messrs. Lehman, Durr & Co., a firm composed of persons whose names are stated, are supposed and believed by affiant, to be indebted to said defendant, as stockholders of said defendant or otherwise, or to have effects of said defendant in their hands, and that affiant believes that process of garnishment against said firm is necessary to obtain satisfaction of said judgment, &c.

The writ of garnishment recites that John W. Watts has made affidavit, as required by law, that Margaret Warren *alias* Warner, at the July term, 1875, of the City Court of Montgomery, recovered a judgment against the Alabama Savings Bank of Montgomery, &c., and proceeds in the regular form to summon the appellants to answer.

The appellants, having craved oyer of the affidavit and writ of garnishment, prayed that the writ be quashed, and in support thereof pleaded as follows:

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"1. It does not appear in said affidavit, by whom the judgment therein mentioned was recovered; whether by Margaret Warren or Margaret Warner.

"2. It appears from said affidavit that the suit in which judgment was rendered, was brought in the name of Margaret Warner and not in the name of Margaret Warren *alias* Warner.

"3. It does not appear in said affidavit, that any judgment was recovered in the name of Margaret Warner or in the name of Margaret Warren *alias* Warner.

"4. It does not appear in said affidavit that the suit, in which judgment was rendered, was brought in the name of Margaret Warner or in the name of Margaret Warren *alias* Warner, and that the writ in this cause is in the name of Margaret Warren *alias* Warner as plaintiff."

The appellee demurred, on the ground that it was no answer to the writ of garnishment, and set up no facts which excused a failure to answer. The court sustained the demurrer and required the appellants to answer, and by agreement the following state of facts was taken as their answer:

"During the session of the legislature of 1872-3, many persons desired to organize the Alabama Savings Bank of Montgomery, under the act of February 12th, 1867, and of the act of December 12th, 1864, provided an amendment to the charter could pass the legislature. This amendment related to the form and character of the certificates of deposit, which might be issued by the company, and which was believed to be material to the success of the company. The appellants, by J. W. Durr, one of their firm, agreed in writing to subscribe for twenty-five shares of one hundred dollars each, of the stock of said bank, and was then told by the person who solicited the subscription, that they would never be called on for but ten per cent. of the subscription. After this agreement to subscribe was signed by others, it was believed that they would be more likely to get the amendment passed, if there was an organization; and with this view a meeting of all who had signed the agreement, and of those who had subscribed unconditionally, was called. None of the firm of Lehman, Durr & Co., were present at this meeting. Directors were then elected, who chose John H. Gindrat, president, and E. H. Metcalf, secretary. At this meeting no call was made for payments of subscriptions to stock, and this was the only meeting of stockholders ever held.

The legislature adjourned without passing the amendment,

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and after this Mr. Metcalf called on the appellants, and J. W. Durr, a member of their firm, "directed their clerk to pay Mr. Metcalf two hundred and fifty dollars and take receipt." The following is a copy of the receipt taken:

"Alabama Savings Bank of Montgomery, Ala., May 21st, 1873. Received of Messrs. Lehman, Durr & Co., two hundred and fifty dollars, being ten per cent. of their stock in this bank.
E. H. METCALF, Cashier."

Durr testified that he did not direct the form of the receipt, which was made out by Metcalf, and that he had never seen it, until he found it among the papers of the firm, after the garnishment was served on them. It was shown that the bank went into operation within two or three doors of appellants' place of business, some time in the early part of 1873, and failed a few months afterwards.

Lehman, Durr & Co. never paid anything else on their subscription, and had never been called on by the officers of the bank for more. The appellee deposited with E. H. Metcalf, as cashier of the Alabama Savings Bank of Montgomery, eight hundred and seventeen dollars, and upon his failure, on demand, to repay her, she brought suit against the bank, in the City Court of Montgomery, in the name of Margaret Warren alone, and obtained a judgment against the bank for the amount of her deposit and interest. The act of incorporation, under which the organization of the bank was claimed to have been effected, was approved December 12, 1864, and creates five persons, naming them, "and their associates and successors in office," a body corporate, under the name of the Alabama Savings Bank of Montgomery. By the second section of this act, the capital stock is fixed at one hundred thousand dollars, with the privilege of increasing it to five hundred thousand; and it is declared "said capital stock shall be a fund pledged for the security of the depositors." Section three of the act declares "that said corporation may go into operation so soon as their capital stock is paid in, and not before. There was an act amendatory of the charter, passed in February, 1867, but its provisions, so far as the questions raised by this record are concerned, are substantially the same as those of the act of incorporation, with the exceptions that the second section of the amending act relieves the stockholders of any personal liability for the debts of the corporation, over and above their stock; and the third section of the incorporating act is so amended, as to allow the bank to go into operation so

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soon as ten per cent. of its capital stock is paid in, and not before.

It was shown that there never had been \$100,000 subscribed for stock in said bank, including the amounts agreed to be subscribed as above stated; and ten per cent. on the amount subscribed or agreed to be subscribed, had never been paid. E. H. Metcalf was the only one of the corporators named in said acts, who was present at said meeting. This was all the evidence, and the court rendered a judgment against the garnishees for the amount of the judgment recovered by the appellee against the bank, with interest to date. Motion was made by the appellants to set aside the judgment against them on the grounds: 1st, "that plaintiff has never recovered a judgment against the defendant in said cause;" 2d, "that these garnishees are not, and have not been indebted to said defendants;" 3d, that the entry of judgment against these garnishees is a mistake." This motion was overruled. The appellants assign as error, the ruling on the demurrer to the pleas, the rendition of judgment against the garnishees, and the overruling of the motion to set aside the judgment.

HARRIS GUNTER, for appellants.—The demurrer to the pleas of the garnishees should not have been sustained. The judgment against the bank was rendered in favor of Margaret Warren, and the garnishment suit must be commenced and prosecuted in the name of the plaintiff in that judgment, no matter who may be its real owner.—*Jackson v. Shipman*, 28 Ala. 492. The objection is made and properly so, by plea in abatement.—*Curry v. Woodward*, 50 Ala. 259. A garnishment is not an equitable, but a legal remedy, and operates only on legal rights, such as the debtor could enforce by action at law.—1 Brick. Dig. 173–5, §§ 276, 313, 314. The plaintiff has no greater right against the garnishee, than the defendant had.—*Drake on Attachment*, §§ 458, 462. The appellants can make any defense, which would have availed them in a suit by the bank against them. There never was such a corporation as the Alabama Savings Bank of Montgomery, and if there was no such corporation, then appellants can not be made liable as stockholders. The act of December 12, 1864, and that of February 12, 1867, both expired by limitation long before any attempt to organize—and this by force of the statute now forming section 2025 (1773) of the Code of 1876. It is there provided that if any private corporation, hereafter cre-

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ated by the General Assembly, or incorporated under any law, does not organize, and commence business within two years from the date of its incorporation, *its corporate powers cease*. There was no attempt to organize, until the winter of 1872-3, more than two years after the last act when the corporate powers conferred by these acts had ceased to exist. The alleged subscription is a contract with the corporation, upon the terms of the act creating it.—11 Ala. 450. Until there was a legal corporation to make the contract of subscription with, the contract conferred no rights and created no liabilities, unless it was ratified after a *legal organization*.—*Valk v. Crandall*, Sand. Ch. 179. There never was a legal organization, and the contract of subscription never became binding on any person. We may go further, and admit for the sake of argument, that the acts of 1864 and 1867 were still in force, and that a legal organization could be had under them. Still, there was no valid organization. The charter in each act is granted to five persons, naming them, and it was shown that only one of the corporators was present at the attempted organization. The grant must be accepted by a majority at least of those intended to be incorporated.—Ang. & Ames on Corp. (6 ed.) §§ 81, 84, 85. Again the original act required all the stock to be paid in, and the amendatory act required ten per cent. to be paid, as a condition precedent to the organization. It was clearly shown that neither statute was complied with, and for this reason there never was a legal organization. The cases cited by the appellee, to show that the appellants can not set up these matters, do not apply to a case like this, and apply only where there have been dealings with the corporation subsequent to its organization.—See *Valk v. Crandall*, 1 Sand. Ch. 179.

It is plain, we think, that when one is garnished as stockholder, he can show that he subscribed in good faith, and paid his ten per cent. as required by the charter; that the requisites of a legal organization were never complied with, and that after the illegal organization he never in any way sanctioned it, or estopped himself from denying its corporate existence. The subscriber by his subscription admits nothing more than the charter asserts; and if that contemplates some further act to be done, before a requisition may be made upon the subscribers for payments upon their stock, or before they are liable to suit, that act must be shown to have been done.—*Carlisle v. Cahaba & Marion R. R. Co.*, 4 Ala. 76.

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WATTS & SONS, *contra*.—The matters set up in the pleas, were not such as could avail the garnishees. A garnishee can not question the ownership of the judgment against the defendant-debtor. — *Jackson v. Shipman*, 28 Ala. 488. Neither can he take any advantage of any irregularities or defects in the judgment, unless the judgment is void.—See 1 Brick. Dig. p. 182, § 405; *Curry v. Woodward*, 50 Ala. 259. The appellants can not set up in this action any irregularities in the organization of the bank. They waived all right to do so, and elected to treat the organization as legal and valid, when after the adjournment of the legislature, which was to pass the amendment, and after it was known to them that the amendment could not be obtained, they paid ten per cent. on their stock, and took a receipt which on its face shows that it was given by one who professed to have the right to give it, by virtue of that very organization they now seek to assail as illegal and invalid. This receipt shows that there was no condition to their subscription, and that if there was, it was waived.—*Lane v. Brainard*, 30 Conn. 565; *Graff v. P. & S. R. R. Co.*, 31 Pa. St. 489. This payment estops them from denying that they are stockholders.—*Maltby v. N. W. V. R. R. Co.*, 16 Md. 422. It is contended that the subscription was made after Durr had been told by Metcalf that he would never be called on for but ten per cent. of the amount subscribed. This remark did not bind the bank.—See *Smith v. P. R. Co.*, 30 Ala. 650. Such a condition would be directly inconsistent with and repugnant to the obligation to take twenty-five shares of \$100 each. Such a condition would be void.—*Downie v. White*, 12 Wis. 176; *Blodgett v. Morrill*, 20 Vt. 509; Redf. on Railways, § 48, and note 1, and authorities there cited.

The requirement, in the acts of 1864 and 1867, as to the amount of stock to be paid in, was a condition subsequent—the first sections of the acts made the incorporators a body politic and corporate without conditions, and no stockholder can avail himself of such failure, to avoid his obligation. Ang. & Ames on Corp. § 777; *Duke v. Cahaba Nav. Co.*, 17 Ala. 376; *Smith v. P. R. Co.*, 30 Ala. 650; *Sprowl v. Lawrence*, 33 Ala. 674. In this last case, it is laid down (after an elaborate discussion of the authorities), that it is an established principle, that until the forfeiture of a charter is judicially decreed, neither the forfeiture, nor the cause of it, can be inquired into in another suit; nor can the existence of the corporation be questioned, incidentally or collaterally. 2 Kent, 312, and cases cited; 13 La. 503; *Michles v. Roches-*

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ter Bank, 11 Paige, 118; 5 Allen (Mass.) 446; *Smith v. O'Brien*, 9 Mass. 423; 41 Me. 512; 16 B. Monroe, 4.

The facts show that Lehman, Durr & Co. subscribed to the stock *before* the meeting of the stockholders, and *before* the adjournment of the legislature, and that *after* the *organization*, and after the bank had gone into operation, and after they knew of the organization, and knew that the amendment to the charter had failed, they paid the *ten per cent. of their stock*. The payment, under the circumstances, and after they knew that the bank had gone into operation, within two or three doors of their place of business, prevents them from now making the defense attempted. On the faith of the organization and of the subscription of stock, the appellee deposited her earnings in the bank, and it is neither justice nor law to allow these subscribers to defeat her claim, for the return of her money.

BRICKELL, C. J.—1. A garnishee can not take advantage of mere irregularities or defects rendering the judgment voidable at the election of the defendant, if within the time, and in the mode which the law prescribes, he pursues proper remedies to avoid it. If the judgment is not void, the garnishee will be protected from any further demand of the defendant if judgment is rendered against him. There are irregularities in the commencement and prosecution of suits at law, which are available to the party who may be injured by them, only by pleas or objections interposed at particular stages of the suit; and which before judgment are regarded as waived, ceasing to be impediments to its rendition, unless properly presented at the time and in the mode the law and the practice of the court may appoint. Of these is the *misnomer* of a party plaintiff or defendant, which is the matter of a plea in abatement, and which if not pleaded, is regarded as waived. When it becomes necessary to aver or plead the judgment, the real party, notwithstanding the mistaken name, may be connected with it by averment of his proper name. The plea in abatement of the want of correspondence between the name of the plaintiff in the garnishment and in the judgment was not well taken, and the demurrer to it properly sustained.

2. The garnishment is issued against the appellants as stockholders in the *Alabama Savings Bank*, and to subject so much as is due and unpaid on their subscription to the capital stock of the bank. The judgment was rendered on the uncontested answer of the appellants, and it can be sup-

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ported only on the theory that an indebtedness is admitted, which the bank, if suing in its own name, could recover in an appropriate action. A garnishment is strictly a legal remedy, intended and adapted only to reach such legal demands, as the debtor could enforce; and whatever defenses, (there being no question of fraud, or collusion as between the garnishee and the debtor), would be available against the latter, are available against the creditor, pursuing this remedy. Such defences the garnishee may interpose by answer, and their truth as matter of fact will be presumed unless the plaintiff in the writ contests them. Their sufficiency in law, the court determines in pronouncing judgment on the answer.

3. The answer of the appellants admits a subscription for twenty-five shares, of one hundred dollars, to the capital stock of the bank, made during the session of the General Assembly of 1872-73, and that other subscriptions were made by other persons, who were desirous of organizing the bank, and transacting business, under the act of 1864, incorporating it, (Pamph. Acts 1864, p. 116), which was re-enacted and amended by an act approved February 12, 1867, (Pamph. Acts 1866-67, p. 397), if they could procure from the General Assembly, an amendment of the charter in relation to the form and character of the certificates of deposit, the bank could issue. The subscriptions of stock were conditional, dependent on obtaining such amendment; but as it was believed that such amendment would be more easily obtained if the corporation was organized, an organization was effected, the appellants not actively participating in it, by the election of a board of directors, a president and cashier. The amendment was not obtained, and after the adjournment of the General Assembly, the appellants paid ten per cent. of their subscription of stock, taking a receipt in writing for the amount paid, expressing that it was ten per cent. of their stock, which purports to be the act of the bank, and is signed by its cashier. The bank commenced and continued business with the knowledge of the appellants, for some time after this payment, and without so far as is shown by the answer, any dissent or objection from them. While so in operation, the appellee made a deposit of money with the bank, for which the judgment on which the garnishment issued, was recovered. The minimum of the capital as fixed by the act of incorporation, was one hundred thousand dollars, and ten per cent. of it must have been paid in, before the bank could go into operation. The answer denies that

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there was one hundred thousand dollars subscribed to its capital stock, or, that ten per cent. of it was paid before the organization, or prior to the commencement of business by it. It is also insisted that the organization which was had, and the exercise of corporate power by the bank, were in violation of the statute, which inhibits the organization of private corporations after the expiration of two years from the date of their incorporation.—Code of 1876, § 2025.

The matters of defense against the liability of the appellants thus presented, are directed against the *legality*, and not the *fact* of the existence of the corporation. All corporations, public or private, are created by law. The power which they exercise, the right to exist, is derived from legislative grant, either under the operation of general laws, or from special enactment. They may exist either *de facto*, or *de jure*. If they exercise corporate power—if they possess and enjoy corporate franchises, under *color of right*, as when there is a legislative grant under which these are claimed, there can be no doubt, that a private person can not be heard to inquire into the *legality* of corporate existence. The corporation must of necessity be presumed to be rightfully in possession of the franchise, and rightfully to exercise the power, which the legislative grant confers. Individual right is not invaded, if the negative is true in fact, and there is usurpation. It is the State—the sovereign—whose rights are invaded, and whose authority is usurped. The individual could not create the corporation—could not grant, define, limit its powers; and no grant of these by the sovereign can lessen his rights. There can consequently be no cause of complaint by the citizen, and no right to inquire whether corporate existence is *rightful*—*de jure*, or merely *colorable*. There may be usurpation—all the conditions which the State may have imposed on its grant of authority, may have been violated. The usurpation is of the authority of the State—the violation of good faith, is of the faith due to the State, and not to any one of the citizens of the State. The State may acquiesce in the usurpation, and may waive the breach of the conditions on which rightful corporate existence depends. Within its sovereign power rests the election of acquiescence, waiver, or disputation. The individual can not intervene and exercise this power, and conclude the State, as he could not have intervened, and concluded the State by the grant of corporate existence and power. The grant of the State—the sovereign—can be construed alone by the power from which it proceeds, and the sovereign alone

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can determine whether there is usurpation, and not then, until those who claim the right have the opportunity of being heard. Of the right they are exercising, it would be as odious and unjust to dispossess them, as to disseize the *liber homo* of the common law of his freehold, without due process of law. There was a legislative charter of the *Alabama Savings Bank*—a *color of right* for the existence of such corporation; and for the exercise of the powers the charter conferred. It may be conceded, the corporation could not rightfully exist, unless it was organized and commenced operations within two years from the date of the charter. The State imposed the limitation of time, and the State could waive it. There was an acquiescence by the State in the subsequent organization; and so long as the State acquiesced, individuals had no cause of complaint. There was neither loss nor gain to them. So it may have been a condition precedent to corporate existence, that the minimum of the capital stock, should have been subscribed, and ten per cent. thereof paid, before the corporation could exercise corporate power. The condition was imposed by the State, and the State could waive its performance. The waiver must be presumed, until the State intervenes. The corporation incurs all its liabilities, is estopped from disputing them, and without infringing on the rights of the State, an individual can not be heard to inquire into the rightfulness of corporate existence. It may be the public may sustain injury from the usurpation of corporate existence, but it must be presumed the sovereign jealous in the imposition of the conditions, will be as jealous in resuming the power granted only on the conditions which have not been performed. Hence, the rule stated in the text books, and recognized by repeated decisions of this court, that the legality of the existence of a corporation, or the question of a forfeiture of its charter, if it has once had a legal existence, will not be inquired into collaterally, as in suits by or against the corporation in which it has legal claims against an individual, or an individual may assert legal claims against it.—*S. & T. R. R. v. Tipton*, 5 Ala. 787; *Duke v. Cahaba Navigation Co.*, 16 Ala. 272; *Harris v. Nesbit*, 24 Ala. 398; *Marion Savings Bank v. Dunkin*, 54 Ala. 471. In *Sprowl v. Lawrence*, 33 Ala. 690, the principle is stated with clearness: "It is laid down as an established principle, that until the forfeiture of a charter is judicially decreed, neither the forfeiture nor the cause of it can be inquired into in another suit, nor can the existence

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of the incorporation be questioned incidentally or collaterally."—Ang. & Ames, Corp. §§ 635, 636.

But upon another ground, the defences urged by the appellants can not be sustained. The fact of the existence of the corporation is undisputed, as is also the fact that the appellants contributed to its existence, organization, and transaction of business. The existence at first may have been intended as fictitious, though the design was to induce the General Assembly to believe it was real, and thereby invite favorable legislative consideration of the amendment of the charter. Whatever of objection could have been made, if any could have been made by the appellants to the validity of their subscription on this ground, they could waive; and they did waive, when subsequently they made a payment on their subscription, aiding to convert the *fictitious* into a real organization, setting the corporation into motion, and permitting it to exercise its corporate powers. The charter in express terms declares the capital stock *shall be a fund pledged for the security of depositors*. To this provision of the charter the appellants must be regarded as yielding assent, when they made the payment on their subscription for stock and acquiesced in the organization of the bank, and its transaction of business. The right of depositors had attached, the subscription became a security for them, and the appellants could not subsequently withdraw it to their prejudice; nor to the prejudice of the corporation, through whom the right may be after judgment enforced by garnishment.

It is also too well settled now to be controverted that a party who contracts with a corporation, whether it be by a subscription for its stock, or by promissory note, bond, mortgage, or other form of contract, is estopped from denying the existence of the corporation.—Ang. & Ames Cor. § 636; 1 Redf. Rail. 66, and authorities cited; *Eaton v. Aspinwall*, 19 N. Y. 119. If the corporation had been successful—if profits had been realized from the transaction of its business, the appellants would have reaped a just share. The corporation would not have been permitted to deny the legality of its existence, and interpose such denial to bar the right of the appellants. The estoppel is reciprocal, and binds the appellants now that the burthens of the contract are to be borne.

It is often said that when a corporation sues, its corporate existence must be shown, if it is controverted. When the action is against one contracting with it in its corporate ca-

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capacity, the contract furnishes the evidence. If the action is against a stranger, the user of the corporate power and franchise, and the color of right afforded by a legislative grant, is conclusive. There may be contracts made with a corporation, and made expressly dependent on the fact of the legality of its organization, and in an action to enforce such contracts, the burthen of proving a legal organization may rest on the corporation. This case is not of that character; nor is it of that class of cases in which the defense of *ultra vires* is involved. A corporation can not enforce or be made liable on a contract, it was without capacity to make, and if the contract is without the scope of its powers, neither party is estopped from asserting its invalidity.—*City Council v. M. & W.R.R. Co.* 31 Ala. 76; *Marion Sav. Bk. v. Dunkin*, 54 Ala. 471. The extent of corporate power, is a very different question from the fact of corporate existence. In the one case, the extent of power affects only the corporation, and the individual contracting with it; and they alone have rights or interests involved. In the other, the State has the right, and the only right to inquire into the legality of corporate existence—to construe its own grant—to determine, if there is usurpation, whether it will acquiesce in it, or resume the power which has been usurped. The City Court did not err in rendering judgment against the appellants.

Affirmed.

MANNING, J.—I desire not to be understood as expressing either assent to or dissent from some of the views and conclusions concerning mere usurpers of corporate franchises, presented and asserted in the opinion of the Chief-Justice. Some of them appear to me to be questionable. Perhaps, if I had leisure to consider the subject thoroughly, my conclusions might entirely coincide with his. I agree, however, that appellants have debarred themselves, according to their answer, from denying in this cause, the corporate existence of the body organized as the Alabama Savings Bank, set up by themselves and others, under the acts of the legislature passed to authorize the formation of such an institution, and from denying their membership therein, or liability as stockholders to the claim of appellee.

I therefore concur in the judgment of affirmance.

STONE, J., not sitting.

[Turner v. McFee.]

Turner v. McFee.*Trover for Conversion of Horse.*

1. *Evidence; admissibility of.*—The identity of a horse, described in a mortgage as an “iron grey colt,” being in issue, a witness testified that “he believed the horse [in defendant’s possession] was the same animal as that described in the mortgage, though he could not state of his own knowledge that it was the same; that the horse had no marks or distinct features, whereby he could recognize him from any other grey horse, but he believed he was the same horse described in the mortgage, and was satisfied he was the same,”—*held*: not error to refuse to exclude such testimony, in the absence of proof, by cross-examination or otherwise, that the witness was ignorant of the matter about which he testified, or spoke merely at random.

2. *Mortgage; what sufficient consideration.*—One’s own debt, though past due, is always a sufficient consideration to support his mortgage to the creditor to secure the debt; and as to parties and privies is as effectual, as if made upon an adequate new consideration.

3. *Mortgage; registration of; what will not avoid effect of.*—A mortgage duly filed for record and recorded, will not lose the privileges conferred by the registration statutes, because of the failure of the probate judge to properly note it in the index, which the law requires him to keep.

APPEAL from Circuit Court of St. Clair.

Tried before Hon. W. L. WHITLOCK.

The appellant, McFee, brought trover against Turner for the conversion of an “iron grey colt.” A trial was had in February, 1877, resulting in verdict and judgment against Turner, who reserved exceptions, and brings the case here by appeal.

On the trial, plaintiff offered in evidence a mortgage executed to him on the 18th day of January, 1870, by one John Collins, which conveyed certain lands and other personal property, and “one iron grey colt.” This instrument recites that it is given “as security, for the payment of a certain promissory note, executed by said John Collins to said McFee, on the 23d day of February, 1860, payable one day after date, for the sum of \$1346,” and provides, in default of payment before the first day of January, 1872, that McFee might enter and sell, &c. This instrument was duly executed and acknowledged, and filed for record and recorded in the office of the probate judge of the county on the 8th of February, 1870. The defendant objected, on the ground that it was executed without any consideration; that under the instrument, no title or interest in the property therein de-

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scribed passed to the plaintiff, and that said mortgage was executed for a wholly past consideration. The court overruled the objection, and admitted the mortgage in evidence, and the defendant excepted.

Ramsey, a subscribing witness to the mortgage, testified that "there was an iron grey horse or an iron grey colt described in said instrument, which he believes to be now in the possession of defendant—the one described in the complaint—but could not state of his own knowledge that it was the same horse; that the horse had no marks or distinct features in the way of color, whereby he could recognize him from any other grey horse or colt, but he believes him to be the same iron grey horse described in the mortgage, and was satisfied that he is the same horse." The defendant "objected to the witness giving his belief as evidence, and requested the court to exclude the belief of the witness from going to the jury as evidence; which objection the court overruled, and allowed the belief of the witness to go to the jury as evidence," and defendant duly excepted.

One Roberts testified that "he knew the grey horse mentioned in the mortgage; that he thought it was the same horse which is now in the possession of the defendant, but could not state of his own knowledge that it was." The defendant objected "to this statement of the witness, that he thought it was the same horse mentioned in the mortgage, being given to the jury as evidence; which objection was overruled, and the testimony of the witness as stated was allowed to go to the jury—to which ruling defendant excepted." McFee never had possession of the horse. The proof showed that the mortgage was executed for the consideration therein stated, without any renewal of the note. The "proof also showed that defendant did not obtain the horse from Collins, and failed to show when the horse went into defendant's possession, but that he obtained possession before 1875." There was evidence tending to show that defendant converted the horse, and the value thereof.

Defendant introduced the present probate judge of the county, and proposed to prove by him, that notwithstanding the mortgage was recorded by his predecessor on the 8th day of January, 1870, "the record of such instrument was not mentioned or indexed in the index to the book in which the mortgage was recorded, or in any other index kept in his office, until the year 1875, after Collins' death, and after parties interested had searched for the same in the office, and not until the mortgage was produced, and witness

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thus enabled to find where it was recorded, was the record of it properly indexed in 1875." On objection of plaintiff, the court excluded the proffered evidence and defendant excepted.

The court charged the jury, in substance: 1st, if they believed from the evidence that the horse described in the complaint, is the horse mentioned in the mortgage, they should find for the plaintiff; 2d, that as to the parties and privies to the mortgage, or those holding under them, the mortgage was not without sufficient consideration, though the note secured by it was past due and not renewed, and upon the execution of the mortgage the legal title to the property therein described, passed to the plaintiff. The defendant duly excepted to the giving of each of these charges, and now assigns as error the various rulings to which he excepted.

JOHN W. INZER, and L. F. BOX, for appellant. The consideration for the mortgage was wholly executed and passed, and not sufficient to support it.—*Shaw v. Boyd*, 1 Stew. & Por. 83; *Dockery v. Hall*, 9 Ala. 128; 38 Ala. 706; *Jackson v. Jackson*, 7 Ala. 91; *Boyd v. Beck*, 29 Ala. 703. The opinion or belief of the witnesses was not competent evidence. Registration operates constructive notice, only when made in conformity to the statute. Depositing a mortgage for record constitutes notice only so long as the instrument itself remains on the file—the fact of deposit ceases to be notice after the instrument is taken away. In order to constitute notice, the mortgage must be properly recorded in proper books kept for that purpose. Subdivision 792 of Revised Code, directs what must be done to constitute proper recording, when it requires direct and reversed indexes. The failure to index is a breach of the judge's bond; it is not the fault of the defendant. Without proper indexing there is no recording entitled to the statutory privileges.

JOHN W. BISHOP, and BRADFORD & BRADFORD, *contra*.

MANNING, J.—This was an action of trover by a mortgagee for a horse claimed as a part of the property conveyed by a mortgage-deed of one Collins to him. Ramsey, a subscribing witness to the mortgage, which was made five or six years before, testified that he believed the horse in controversy was the same animal described in that instrument as

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an iron grey colt ; that he could not state of his own knowledge that it was the same horse ; that the horse had no marks or distinct features in the way of color whereby he could recognize him from any other grey horse, but he believed him to be the same iron grey colt or horse described in the mortgage, and was satisfied he was the same. Exception was taken to the refusal of the court to rule out this evidence.

We think the court did not err. A considerable time had probably elapsed since the witness had seen the horse, for which reason he may have been reluctant to be positive in affirming that about which it was possible he might be mistaken. The subject of his testimony, the identity of a horse—was one requiring the exercise of both judgment and memory. If appellant's counsel distrusted the witness, they ought to have cross-examined him to make it apparent, if the fact was so, that he spoke at random. We well know that though a horse may have "no marks, or distinct features in the way of color, whereby a person could recognize him from any other grey horse"—yet there is a carriage, an action, a style about such animals, by which those of the same color may be known from one another, though the differences can not be very intelligibly described to a jury. As it is generally easy for a defendant who has such an animal, to show from whom he got him—and from whence he came, such evidence as that given by this witness, ought not to have been ruled out without something more being elicited, to show that he was ignorant of the matter he testified about.

The same observations are applicable to the evidence of Robinson, "who testified that he knew the grey horse mentioned in the mortgage, and thought it was the same horse now in the possession of defendant." There being no cross-examination, nothing elicited from, or spoken by the witness showing that he was testifying ignorantly, there was no error in refusing to rule out his testimony.

It is objected as error, that the mortgage was allowed to be introduced as evidence, although it appears therefrom as well as by testimony, to have been executed to secure payment of a debt past due. This, it is contended, shows that there was no consideration to support it ; and objection was made to it for that reason. This is not a controversy with a creditor or *bona fide* purchaser assailing the mortgage as made to hinder and delay or defraud ; but it is contended that being executed as a security for a past-due indebtedness of Collins, the mortgagor, it was not valid against him.

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The authorities cited do not sustain this proposition. They are cases in which a third person without any new consideration, signed either a note previously made and delivered, or a new note or other security, for the payment of another person's pre-existing debt. No case can be found in which a man's own debt has been ruled to be an insufficient consideration between him and his creditor, for a mortgage or other security received by the latter from his debtor.

The failure of the recording officer to have the mortgage when recorded, properly noted in the index he is required to keep, is not to be charged as a fault against the mortgagee. Code of 1876, § 2149 (1539). "This statute relieves a party who has done all that is devolved upon him by the law, from the consequence of the failure of the probate judge to discharge his duty, or of the imperfect manner in which he discharges it. The conveyance being operative as a record from the time of its delivery to the judge, no subsequent mistake of his could deprive it of the operation thus given it by law."—*Mims v. Mims*, 35 Ala. 25.

We find no error in the record, and the judgment is affirmed.

Boykin, Ex'r, et al. v. Cook, Adm'r.

Bill in Equity to subject Lands descended to Heir, &c.

1. *Judgment against personal representative; when not evidence against heir or devisee.*—A judgment against the executor on a cause of action against the testator, is no evidence of the existence of indebtedness as against the heir or devisee, on bill to subject lands devised or descended; but the rule is otherwise, where the devisee is executor, and the judgment is against him in his representative capacity; for on return of no goods of testator, execution could issue *de bonis propriis*.

2. *Judgment; what grossly irregular.*—Judgment to be levied *de bonis propriis*, in a suit against the executor as such, on a cause of action against the testator, is grossly irregular, and is properly amended *nunc pro tunc* at a subsequent term so as to make it *de bonis testatoris*; and the amendment when made will relate back to the date of the original judgment.

3. *Same; when void.*—A sale of the testator's lands, devised or descended, levied on and sold as his property, under executions so framed as to operate only on the executor personally, and issued on a judgment against him in his representative capacity, and a deed conveying such title as the defendant had as executor in the lands, are utterly inoperative and void.

4. *Purchaser at judicial sale; when not bound by.*—In general a purchaser at judicial sale, is bound, though he takes nothing thereby; but the rule is

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subject to the exception that no one will be bound, if the sale is absolutely void.

5. *Same*.—The plaintiff in a judgment against the executors, in their representative capacity, who causes execution issued thereon and operating only against them personally, to be levied on lands of the testator, devised or descended, and sold as such, bidding the full amount of his judgment, and receiving a conveyance of all the interest the executors had as such in the lands—does not thereby satisfy the debt, the sale and conveyance being void, and he not actually realizing anything at the sale.

APPEAL from Clarke Chancery Court.

Heard before Hon. A. W. DILLARD.

Pleiadés Brown filed this bill against Francis B. James, and Samuel T. Boykin, as executors of Robert D. James, deceased, and against the widow, and legatees and devisees under the will of said Robert D.—said Francis B. being a devisee also—to subject lands devised, for payment of certain judgments, which Brown alleged were subsisting and valid claims against the estate. Brown having died pending suit, it was revived in the name of Zo. S. Cook, as his administrator.

The case made by the pleadings and proof was substantially as follows :

At the fall term, 1868, of Circuit Court, Brown obtained judgment against the executors, upon a demand against their testator, for the sum of \$3,750. At the same term, John T. Taylor obtained judgment against the executors, upon a demand against their testator, for \$483. At the spring term, 1869, Solomon Nordlinger obtained judgment against the executors, on a cause of action against their testator for the sum of \$1,500.

Each of these judgments was entered up, to be levied of the goods and chattels, lands and tenements of said Boykin and said James. Brown purchased the Taylor and Nordlinger judgments, and they were duly transferred to him. The original *fi. fa.* issued on the Brown judgment commanded the sheriff to cause the amount thereof and costs to be made “of the goods and chattels, lands and tenements of Samuel T. Boykin and Francis B. James, executors of Robert D. James, deceased.” The sheriff levied it on certain described lands, as the property of Robert D. James, deceased. This was not executed for want of time, and a *venditioni exponas* issued, directing the sheriff to sell the lands thus levied on, which the writ describes as “the property of Samuel T. Boykin, and Francis B. James, as executors of the estate of Robert D. James, deceased.” Similar proceedings were had on the Taylor judgment. This was done at the instance of Brown, and he caused the levies to be made as above stated.

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At the sheriff's sales, in July and August, 1869, Brown bid the full amount due upon these two judgments, and paid the costs. He received deeds to the lands thus levied on, from the sheriff, conveying "all the right, title, and estate which Samuel T. Boykin and Francis B. James, as executors, had," &c., and the sheriff returned these executions "satisfied." Execution on the Nordlinger judgment was not levied, but returned "no property." Afterwards, on Brown's motion, the Circuit Court amended and corrected the judgments *nunc pro tunc*, and entered them up to be levied of the goods and effects of the testator. Brown failed to obtain possession of the lands. He then moved the Circuit Court, in which the judgments were rendered, to set aside and vacate the sales and satisfaction of the judgments; but the court overruled the motion, on the ground that a court of law had no jurisdiction of the matter.

The prayer of the bill is that defendants be required to affirm or disaffirm the sales; that in event of disaffirmance, the court will decree the sales were null and void, and restore complainant to his original rights under said two judgments, and that the lands be condemned for their satisfaction, &c.

The answers do not admit, but deny the indebtedness of the testator. They allege satisfaction of the judgments by reason of Brown's purchase, under the circumstances above stated; that the judgments were illegal and void, and so were the executions issued on them, and deny that complainant is entitled to relief.

The evidence shows that Robert D. James died testate in 1860, leaving a large estate in lands and personal property, the latter consisting mainly of negroes. The will was duly probated and the executors qualified. The personal property was divided soon afterwards. At the time the bill was filed, there was an entire insufficiency of personal assets to pay debts, the executors and their sureties were insolvent, and the lands were in possession of the widow and devisees. No evidence of the existence of the debts was offered, other than the records of the judgments.

The chancellor decreed that complainant was entitled to relief, that the sales by the sheriff were void, and the sales being void the purchases under them were nullities and no bar to the relief sought; and he, thereupon, ordered a reference to ascertain the amount due complainant, and what lands should be sold to satisfy his claims.

This decree is now assigned as error.

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WATTS & SONS, and JOHN Y. KILPATRICK, for appellants.—The original judgments and executions were voidable, at most, though lands belonging to the James' estate could not be sold under them; but all the interest the executors had in them could be sold. Brown caused these proceedings to be taken, with his eyes open; and by his acts has satisfied the judgments. They stand satisfied on the record, and there was no appeal from the refusal of the Circuit Court to set aside the sale and the satisfaction of the judgments. The proper court to do this, was the court rendering the judgment.—*Tudor v. Taylor*, 26 Vermont, 444; *McCartney v. King*, 25 Ala.

2. Brown having directed the sale, pointed out the property, and bought himself, in the absence of fraud practised on him, can not deny the validity of the sale, or be relieved from the consequences of his own negligence or folly.—*Perkins v. Winter*, 7 Ala.; *Lampkin v. Crawford*, 8 Ala.; *McCartney v. King*, 25 Ala.

3. Brown is entitled to no relief on the Nordlinger judgment. Since the correction of the judgment-entry there has been no execution issued returned, and hence no evidence that he has exhausted his legal remedies.—35 Ala. 76; 33 Ala. 137; 16 Ala. 550; 12 Ala. 580.

THOS. H. PRICE, *contra*.—The executions, levies and sales were void.—4 Ala. 681; 6 Ala. 635; 15 Ala. 681. The thing sold was not subject to levy and sale, and unless it was, a purchase at judicial sale will not amount to a satisfaction *pro tanto*.—*Niolin v. Hamner*, 22 Ala. 578. Nothing was paid in this case but the costs. The heirs and devisees can not disaffirm the sales, and hold on to the land; in one minute proclaiming the sale void, and in the other insisting on a credit for a bid made at it. This presents a plain case for equity, and the chancellor properly granted relief. It is not pretended that the Nordlinger judgment has ever been satisfied, and the evidence shows the insolvency of the only parties, whom the appellant contends should have been proceeded against at law. Such insolvency, is an excuse for not pressing legal remedies further.

STONE, J.—The heirs of Robert D. James, who are made defendants to this suit, do not, in their answers, admit the existence or justness of the claims sought to be recovered in this proceeding, and the result of this is, that the *onus* was cast on complainant of proving his demand. The only evi-

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dence he offered of his several claims, was the record of recoveries in the Circuit Court, in suits against Samuel T. Boykin and Francis B. James, as the executors of the will of Robert D. James, deceased. These records were not evidence against the other heirs, devisees of Robert D. James, nor against Maria L. James, the widow. In the case of *Steele v. Humes*, at the last term, we considered this question, and after examining many authorities, we reached the conclusion above announced. We deem it unnecessary to re-examine the grounds of that opinion. There being, in this record, no proof of plaintiff's claim other than the records aforesaid, the decree, as against Maria L. James, Robert D. James, jr., and Maria C. Boykin, is without any proof to support it, and must be reversed.

But the suits at law being against Francis B. James, one of the devisees under the will, and judgments recovered against him, the question, as to him, stands on a different footing. Although the suits at law were against him and Boykin in their representative capacity, yet, when judgments were recovered, they authorized executions against them to be levied of the goods of their testator, to be administered; and upon return of such executions, no property found, executions could be issued thereon, *de bonis propriis*.—Code of 1876, § 2620. We hold that these suits and judgments ascertained the existence and amount of the debts, as against Francis B. James. This renders it necessary that we should determine another question, which has been very fully argued.

These suits were brought, and judgments recovered in the Circuit Court of Clarke county; the suits being severally in favor of Pleiades Brown, John T. Taylor and Solomon Nordlinger, and against Samuel T. Boykin and Francis B. James, as executors of Robert D. James, deceased. These suits were founded on claims against Robert D. James, testator; but the judgments were entered, to be levied of the goods and chattels, lands and tenements of said Samuel T. Boykin and Francis B. James. Francis B. James was one of the heirs, and a devisee under the will of Robert D. James. The bill avers that Pleiades Brown purchased, and became the owner of the judgments in favor of John T. Taylor and Nordlinger. On these judgments, so entered *de bonis propriis*, Brown sued out executions, and under his directions, the execution in his own favor, and that in favor of Taylor were levied on lands which Robert D. James died seized, the lands were sold by the sheriff, purchased at the

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sale by Pleiades Brown, and sheriff's deeds made to him. His bid and purchase were for the full amounts due on the two judgments and executions in favor of himself and Taylor. Subsequent to this time, and after a fruitless effort to obtain possession of the lands under said purchase, on the motion of Brown the several judgments were amended and corrected *nunc pro tunc*, and entered up to be levied of the goods and effects of the testator of defendants. Motion was then made in the Circuit Court by Brown to set aside the sales and satisfaction of the judgments; but the circuit judge overruled the motion, holding that it was a proper subject for chancery jurisdiction. The present bill was then filed by Brown, seeking to avoid the effect of the sale under the executions, if effect it had, and to subject the lands of testator to the payment of the judgments.

The bill alleges there are no personal assets of the estate of Robert D. James, and that the executors and their sureties are insolvent. Robert D. James left a widow and three children, devisees and legatees under his will, and all of them, save Mrs. Boykin, a married woman, are obligors on the executorial bond. The bond is in the penalty of three hundred thousand dollars, and bears date in 1860. The inventory and appraisement show a very valuable personal estate, consisting largely of slaves, but several thousand dollars of other personal property. These, it appears, were divided off long before the present bill was filed. We think the testimony establishes the insolvency of Boykin, and that the other bondsmen were without property, except the lands sought to be condemned, which they had acquired under testator's will.

It is manifest that the judgments first rendered in these causes against James and Boykin, to be levied *de bonis propriis*, were not supported by the pleadings, and were grossly irregular. The Circuit Court did right in correcting them; and if there had been an appeal from them to this court, they would have been here corrected at the costs of the appellant.—1. Brick. Dig. 81, § 178, *et seq.* It is contended for appellants in this case that inasmuch as the plaintiff Brown procured the executions on the two judgments—that in his own favor, and that in favor of Taylor—to be levied on the lands, and himself became the purchaser—thus satisfying said two executions—that works a satisfaction of the claim, although Brown took nothing by his purchase. If there be nothing in this case to take it without the operation of the general rule, the position is well taken.—*Mc-*

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Cartney v. King, 25 Ala. 681; *Ricks v. Dillahunt*, 8 Par. 134; *Worthington v. McRoberts*, 9 Ala. 297; *Burns v. Hamilton*, 33 Ala. 210; *Tudor v. Taylor*, 26 Ver. 444; *Dunn v. Frazier*, 8 Blackf. 432; *Anderson v. Faulks*, 2 Harris & Gill, 346; *Cameron v. Logan*, 8 Iowa, 434; *Fox v. Marsh*, 3 W. & Serg. 444; *Dean v. Morris*, 4 Iowa, 312; *Rodgers v. Smith*, 2 Carter, Ind. 526; *Mellen v. Boatman*, 13 Sm. & Mar. 100; *The Monte Allegre*, 9 Wheat, 516; *Thompson v. Munger*, 15 Tex. 523. This is the general rule, but it is frequently one of great hardship. Courts have sometimes granted relief against its consequence.—*McGehee v. Ellis*, 4 Littell, 244; *Muir v. Craig*, 3 Blackf. 293; *Bickley v. Biddle*, 33 Penn. St. 276; *England v. Clark*, 4 Scam. 486. The case of *McCartney v. King* was one of extreme consequences. The rule has this exception. If the sale be void, then no one is bound by the purchase; and unless the plaintiff actually realizes the proceeds, the debt remains unsatisfied.

Amendments of judgments *nunc pro tunc*, take effect as of the date when the original judgment was rendered. These judgments must be treated as if originally rendered against James and Boykin as executors of Robert D. James, to be levied of the goods and effects of their testator, in their hands to be administered. The title to personalty only was in them, and that alone was liable to process properly issued, and pursuing such judgments. It could furnish no warrant for the seizure and sale of lands of the testator, the title to which had vested in the heirs or devisees. We have then the case of a judgment against representatives in their representative capacity, execution against them, so framed as that it could only operate against them personally, and, under it, lands of their testator levied on and sold; levied on and sold, not as the property of Francis B. James and Samuel T. Boykin, but as the property of R. D. James, deceased. The deed conveyed only such title as James and Boykin, as executors, had in said lands. As executors, they had no title whatever which could be levied on and sold; and so the whole proceedings show on their face that no title whatever was conveyed thereby. They did not create any cloud on the title which had descended, nor did the deed convey, nor assume to convey any title which might vest in James and Boykin personally. Being on its face utterly inoperative, we pronounce the deed, and with it the sale under which it was made, without any legal effect whatever, and void.—*McClellan v. Lipscomb*, 56 Ala. 255. We hold, therefore, that

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the claims asserted in this bill were not cancelled or impaired by Brown's purchase at sheriff's sale.

Reversed and remanded.

King v. King *et al.*

Bill in Equity to allot Dower, &c.

1. *Dower; of what estate wife dowable.*—The use or equity of which the widow is dowable, like the legal estate of which she is dowable, is a use or equity residing in the husband; if there is no legal estate, no use or equity, residing in the husband, the wife is not dowable.

2. *Fraudulent conveyance; who can not assail.*—A conveyance to hinder, delay and defraud creditors, is voidable as to them, but valid as to the parties to it; and where by such a conveyance the husband, without intending any fraud on his future wife, divests himself of all estate and use in the lands, nothing is left out of which dower can be carved; and the future wife claiming through him at his death, can not dispute the validity of the conveyance, or have a court of equity engraft any use or trust on the lands, based on the husband's fraud, out of which to carve dower.

APPEAL from Mobile Chancery Court.

Heard before Hon. H. AUSTILL.

The appellant, Susan W. King, filed this bill primarily to obtain dower in lands, which her husband once owned, and also to have his estate settled and distributed. Appellants own children and those of her husband by a former wife, are made defendants.

The material allegations of the bill are substantially as follows: John W. King and appellant were married in Mobile, Alabama, on the first day of June, 1861, and they lived together as man and wife until his death, the 17th day of February, 1876. No administration has ever been had on his estate. Said King, before his second marriage, had accumulated property, but by reason of being surety on an official bond of one Chamberlain, as tax-collector of Mobile county for the year 1845, and of suits pending against him on said bond, he took title to the property acquired in the names of various persons; sometimes in the name of his first wife, Mrs. Christine King, and sometimes in the names of one Hugh Monroe or William Brooks, as trustees for the use of his then living children. The bill describes each parcel of land purchased by King, makes the deeds to the exhibits, and alleges that immediately upon the purchase

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of each piece of property, John King took possession of the same as owner, making improvements and repairs thereon, with his own money, and receiving the income thereof, as his own; that neither said Monroe nor said Brooks ever had or held possession of said land, or in any manner exercised any acts of ownership over said property, either as trustees or otherwise; that the said Monroe and Brooks received said deeds, made to them respectively, with full knowledge that John King bought and paid for said lands, with his own money, and that the titles were made to them to prevent the property being seized, or made liable for King's liability as surety on the official bond of Chamberlain on which he had been sued; that said deeds were not made, or intended to be made, as an advancement to the beneficiaries named therein, to the exclusion of King's after born children, or his widow, but that said conveyances were so made to more securely protect and keep said property from being seized and subjected, to the alleged liability on which he was sued, and for no other purpose.

The prayer was, that the Chancery Court would take charge of and distribute the property to the parties entitled to it; that the property, the titles to which were taken in the names of Monroe and Brooks, be decreed to the parts of the assets of said estate, and be distributed as such; that dower be assigned to complainant in said lands, and for general relief.

The children of John King by his first wife demurred to the bill and assigned thirteen grounds of demurrer to the same, and among others; 1, "the bill shows that the purchase of said property by said King, in the name of and to the use of his wife and their living children was to prefer them to creditors, with fraudulent intent, and can not therefore, be impeached or set aside by said King, or any claiming under, by, or through him. 2. Because the complainant seeks to take advantage of John King's avowed wrong and turpitude, while showing her privity with, and claim under him."

The chancellor sustained the demurrer and dismissed the bill, and his decree is now assigned as error.

TOMPKINS & FAITH, for appellant.

STEWART & PILLANS, *contra*.

BRICKELL, C. J.—Dower is defined by the statute, as "an estate for the life of the widow, in a certain portion of

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the following real estate of her husband, to which she has not relinquished her right during the marriage: 1. Of all lands of which the husband was seized in fee during the marriage; 2. Of all lands of which another was seized to his use; 3. Of all lands to which at the time of his death, he had a perfect equity, having paid all the purchase-money thereof."—Code of 1876, §2232. Dower at common law, existed only when the husband was seized of an estate of inheritance, and died in the life of the wife. Three things were necessary to its consummation: marriage, seisin of the husband, and his death. The seisin must have been of a freehold in possession, and of an estate of immediate inheritance in remainder or reversion.—4 Kent. 34–39. The designation of dower at common law is thus given by Mr. Bishop: "Dower is that freehold estate which is carved to the widow out of the real property whereof the husband was seized at any time during the coverture, of a nature to be inherited by an issue, which she might have had, being usually made to cover one-third of the same for her life, as her right in law growing out of the marriage, and his seisin and death." 1 Bish. Mar. Women, § 243. The right subsists in virtue of the estate of the husband, and is subject to any infirmity or incident which the law attaches to that seisin, or either at the time of the marriage, or at the time the husband becomes seized. The first subdivision of the statute refers to the estates of which the wife was dowable at common law—estates of which the husband had the actual beneficial legal seisin during the marriage. The second subdivision refers to estates of which he had not the legal seisin, but of which another was seized to his use—the technical seizure to use as known in English jurisprudence.—*Harrison v. Boyd*, 36 Ala. 203. The simplest form of which is, "where the legal estate of lands is in A., in trust, that B. shall take the profits, and that A. will make and execute estates according to the direction of B."—4 Kent. 316. The third subdivision refers to cases of purchase by the husband, fully completed at his death, by the payment of the purchase-money, clothing him with an unconditional right to demand from the vendor a conveyance of the legal estate.—*Lewis v. Moorman*, 7 Port. 522; *Crabb v. Pratt*, 15 Ala. 483; *Boyd v. Harrison*, 36 Ala. 533. The use, or the equity of which a widow is dowable, is, as the legal estate of which she is dowable—a use, or equity, residing in the husband. The dower is carved from the use or equity, as it is carved from the legal

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estate, and with the remainder or reversion descending to the heirs, comprehends the whole use or equity. If there is no legal estate, no use, or equity, residing in the husband—if before marriage, by any conveyance, the one or the other, is divested, and such conveyance is not intended as a fraud on the wife,—if its divestiture is by conveyances intended to hinder, delay and defraud the creditors of the husband, the wife is not dowable. There is no estate—no use—no equity residing in the husband from which dower can be carved—no estate, use, or equity, which can descend to the issue of the marriage.—*Whithed v. Mallory*, 4 Cush. 138. Conveyances in fraud of creditors are not void—they are voidable only at the election of creditors, to the extent which is necessary to satisfy their demands, or if the fraud is actual, as to the subsequent purchasers. As to the debtor instrumental in their contrivance and execution, they are as operative, as if they were not infected by fraud. He is estopped, as are his heirs, or those claiming merely in succession to him, from disputing their validity.

The whole theory of the bill filed by the appellant, is, that the conveyances of the premises in which she claims dower, were fraudulent as to the creditors of her husband, and therefore void. They were voidable as to the creditors, but not voidable as to the husband, nor as to strangers having no right or interest to be affected by them. At the instance of the husband, a court of equity could not enforce any trust or use for his benefit springing out of these conveyances. The maxim *in pari delicto melior est conditio possidentis*, applies in courts of equity, as well as in courts of law; and either court, leaves a debtor guilty of fraud on his creditors, to the consequences of that fraud.—*Brantley v. West*, 27 Ala. 542. As there can be no use or equity recognized in the husband in opposition to these conveyances—as such use could only be raised by permitting him to allege his own turpitude, there is no use or equity of which the appellant is dowable. The only question really presented is her right of dower, and that was properly adjudged to be unfounded.

Affirmed.

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Application for Mandamus.

1. *Revision of judgments in criminal cases.*—The court traces the legislation and practice in this State, in regard to the revision of judgments of

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conviction in criminal cases, down to the passage of the statutes now in force.

2. *Same; how judgment in criminal case may be revised.*—Under the laws now in force, two remedies are available to a defendant for the revision of the judgment of conviction; each of which has a different field of operation.

3. *Same.*—He may obtain such revision, by reserving, in the court of original jurisdiction, a question of law for the consideration of the appellate court, the reservation distinctly appearing of record; when this is done, no further act of the defendant is necessary to suspend the sentence, or to call into action the revisory jurisdiction of this court, which under the statute must take jurisdiction of the whole case, and may reverse not only for error as to the question reserved, but for any other error apparent on the record.

4. *Same; how reservation must appear.*—In such case, where the question of law reserved arises on the indictment or ruling upon a plea, motion, or the like, the judgment upon which must appear of record, the reservation must be distinctly presented on the record; it is not the office of a bill of exceptions to present such matter.

5. *Same.*—If the reservation is as to matter not appearing of record, the question must be presented by bill of exceptions, duly taken and signed; and whether the matter is shown by the record, or can be presented only by bill of exceptions, the reservation must be distinctly shown, and must be made at the time of the decision complained of.

6. *Same; remedy when no question is reserved.*—When no question of law has been reserved, the defendant may obtain a revision of the judgment by common law writ of error. Such writ, however, is grantable only by this court in term time, or by a judge thereof in vacation, and then only for error of law apparent of record; though the writ when granted, operates a suspension of the judgment of conviction.

7. *Same; what does not amount to a reservation.*—Merely excepting to the judgment of conviction, and causing that fact to be recited in the judgment-entry, is not tantamount to the reservation of any question for the consideration of the appellate court, and furnishes no predicate for suspension of sentence, or the exercise of jurisdiction by this court under the statute.

APPLICATION for *mandamus*, upon facts stated in the opinion.

JOHN GINDRAT WINTER, for motion.

BRICKELL, C. J.—The facts shown by the record, are, that at the February term, 1879, of the City Court of Montgomery, the appellant was tried for, and convicted of the crime of grand larceny, a felony. No exception was taken to any of the rulings of the City Court during the trial, and consequently no question reserved for the consideration of this court. The jury having returned a verdict of guilty, the petitioner moved in arrest of judgment, alleging as ground of the motion, the insufficiency of the indictment. The motion was overruled, and the petitioner *excepted* as the record recites. Thereupon, the court sentenced the prisoner to imprisonment in the penitentiary for the term of five years. Subsequently, during the term, the petitioner claimed an appeal to this court, which the City Court noted, but re-

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fused on the motion of the petitioner to suspend the execution of the sentence, until the appeal was decided in this court. Before the motion for a suspension of the execution of the sentence was made, the petitioner had been sent to the penitentiary. The present application is for a *mandamus*, to compel the City Court to enter an order suspending execution, until the appeal is heard and decided.

A writ of error, at common law, was the appropriate remedy, by which a party aggrieved by the judgment of an inferior jurisdiction, could remove the judgment for examination into a superior tribunal, having jurisdiction to revise it. The writ was defined, as "a commission by which the judges of one court, are authorized to examine a record upon which a judgment was given in another court, and, on such examination, to affirm or reverse the same according to law." *Cohens v. Virginia*, 6 Wheat. 409. The writ was grantable, in civil cases, *ex debito justitiæ*—in criminal cases, *ex gratia regis*.—1 Bish. Cr. Pr. § 1188–1202; *Lynes v. State*, 5 Port. 236. Until the case cited, there is no instance in this State, of the employment of a writ of error, for the examination of a judgment in a criminal cause. The Circuit Courts, (or City Courts, with concurrent jurisdiction,) by the territorial act of 1807, could at their discretion, on a point reserved, motion in arrest of judgment, or for a new trial, in any criminal case, respite the judgment or sentence, and reserve such point or motion for the consideration of the Supreme Court at their next succeeding term.—Aik. Dig. 243, § 22. By the act of 1820, the Circuit Court was prohibited from referring to the Supreme Court any question of law, *except such as may be novel and difficult, and arise in a criminal cause*. Aik. Dig. 257, § 16. Under these statutory provisions, were introduced, all criminal cases, which were examined in this court, prior to the case of *Lynes v. State*, *supra*, in which a writ of error was issued on a presentation of the record of the Circuit Court.

It is not necessary to trace the history of our subsequent legislation. The 10th chapter, of the 5th part, title 3, §§ 4978–4992, of the present Code, substantially embodies it. A writ of error at common law, would lie only for error *apparent* on the record—matter of substance. Errors may have intervened in the proceedings of the court, upon matters arising incidentally in the trial of the cause, as in the admission or rejection of evidence, giving or refusing instructions to the jury. The record did not disclose such errors, and they were not, of course, examinable on a writ

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of error. That such matters might be placed upon the record, for the examination of the court having cognizance of the cause on error, a bill of exceptions was authorized by the statute, Westm. 2, 13; Edw. 1, c. 31, which is the basis of all subsequent statutes allowing such bills. The statute did not extend to criminal, but was in terms confined to civil cases.—*Ned v. State*, 7 Port. 187; *Browne v. State*, 8 Port. 458. It was said if such bills were allowed, "it would be attended with great inconvenience, because of the many frivolous exceptions that might be put in by prisoners to the delay of justice; besides in criminal cases, the judges are of counsel with the prisoner, and are to see that justice is done him."—2 Bac. Ab. 114. Express and independent legislation, was necessary, to authorize the judge of the primary court to authenticate, or the superior court, to notice on error, a bill of exceptions in criminal causes. A motion in arrest of judgment in a civil, or criminal cause, must be founded on *matter apparent on the record*. The motion is of necessity a part of the record, as is the judgment which the court may pronounce on it. In overruling it, the court of necessity acts *in invitum*, against the party making it. It is not, therefore, the function of a bill of exceptions to present for revision, the ruling of the court on the motion. It is examinable, on a writ of error, without the aid of a bill of exceptions.

The statutes, §§ 4978-4983 of the Code, authorize the defendant in a criminal cause, to reserve for the consideration of the Supreme Court, any question of law arising in any of the proceedings. If the question does not distinctly appear on the record, *it must be reserved by the bill of exceptions*, duly taken and signed by the presiding judge as in civil causes. When the question is reserved, it is the duty of the clerk, within twenty days after the adjournment of the court to make out a full and accurate transcript of the record, attach his certificate thereto, and transmit it to the clerk of this court. If the question is reserved in a case of felony, judgment must be rendered, but execution must be suspended until the case is decided in this court. If in case of misdemeanor, judgment must be rendered, but execution must be suspended, and the defendant may be admitted to bail. No writ of error, no certificate of appeal, nor any process, is necessary for the introduction of the cause into this court, when the mode of procedure prescribed by these sections of the Code, is observed. The reservation of a question, by the defendant, for the consideration of this court, is the fact ap-

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pearing on the record, which calls into exercise the appellate and revisory power of the court. The statutes go further, and distinguishing between civil and criminal causes, provide for a writ of error in the latter causes, while the former are examinable only on appeal. The writ can be granted only by this court in term time, or, by a judge thereof in vacation, and because of *error of law apparent on the record*. The granting of the writ operates a *supersedeas* of the judgment of conviction, as does the reservation of a question for the consideration of this court. In this class of cases, it is the writ of error, which introduces the cause into this court.

When these statutes are read in the light of the common law, and of our former statutes, the legislative intent is manifest. The intent is to confer on defendants in criminal causes, a plenary right to a revision of the proceedings on a judgment of conviction. In pursuance of this intent a right to a bill of exceptions is given—a right which could be conferred only by express legislation. There is no intent to enlarge the appropriate office of a bill of exceptions. The bill is to be *duly taken, and signed by the judge as in civil causes*. The statute authorizing the bill in civil causes, defines its office, with precision—the introduction on the record, of “any charge, opinion, or decision of the court, touching the cause of action, and which would not otherwise appear of record.” The bill can not in a criminal, as it can not in a civil cause, present for revision, any matter which would *otherwise appear of record*.—*Petty v. Dill*, 53 Ala. 641.

There is a further intent, that the defendant shall have an unqualified right to *reserve* for the consideration of this court any question of law, which may arise—whether it is apparent of record, or can be made apparent by bill of exceptions. The question must however be *reserved*—it must be presented for the consideration and decision of the primary court, and the fact of its *presentation*, and its *reservation* for the consideration of this court, must plainly appear on the record, or the case will not fall within the provisions of sections 4978–4983. If it is reserved by bill of exceptions, and is of matter appropriate for a bill of exceptions, of course the presentation and reservation, will appear from the bill. If it is of matter apparent on the record, as a defect in the indictment, sustaining a demurrer to a plea in abatement, or to pleas of former conviction, or acquittal, or to any other plea interposed by the defendant, or overruling a motion in arrest of judgment, the fact of its *reservation* must be shown by a plain, distinct recital of the record. Under the former

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statutes, which authorized the reference to this court of questions of law, as novel and difficult, it was necessary that the record should show clearly the question referred, whether it related to matter of record, or to the rulings of the court on matters arising during the trial, and it was the question referred, and not other matter however apparent on the record, this court could consider.—*Holland v. State*, 3 Port. 292; *Ned v. State*, 7 Port. 187. A reservation of the question for the consideration of this court, as distinctly as a reference under the former statutes, we think is contemplated by the statute.

The reservation must be made when the question is decided by the court adversely to the defendant. The rule applicable to exceptions, that they must be reserved at the time of the decision complained of, must be applied to a reservation under this statute. Otherwise, whether the proceedings are to assume an appellate form would remain unknown, except to the defendant, and the State would be denied the privilege of waiving a decision favorable to it, rather than to incur the hazard and delay of the appellate proceedings.

The further intent of the statute is a necessary consequence of the rights conferred—a suspension of the judgment of conviction, until the decision in this court. This court is required to hear and decide criminal causes, in precedence of all others. And it must be observed, that when the defendant reserves a question for the consideration of this court, it does not rest in his power after a judgment of conviction, to withhold the question from the court. He has no power over the record, and no duty to perform in reference to it. With or without his agency, and with or without his consent, or in despite of his dissent, the clerk must within twenty days after the adjournment of the court, send to this court, a transcript of the record, and on the filing of this transcript, the cause is here for decision.

But if a defendant has not reserved any question for the consideration of the court, the common law remedy of a writ of error remains to him, and the mode of obtaining it, and its operation is regulated by the statutes. It is grantable by this court in term time, or by any judge thereof in vacation, but only for *some error of law apparent* on the record. The statutes thus furnish a defendant in a criminal cause, two remedies, for the revision of the judgment of conviction, each having a different field of operation. The first is, when in the court of original jurisdiction, he reserves a

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question of law for the consideration of this court, the reservation appearing of record, calling into exercise the revisory jurisdiction of the court—the second is, the writ of error lying when he has not reserved a question of law, but there is error of law apparent on the record. In either case, when the record reaches this court, the statute imposes the duty on the court of rendering “such judgment on the record as the law demands.” The court is not confined to the questions reserved, as under the former statutes when questions were referred, but the whole record is examinable, and if error has intervened to the prejudice of the defendant, the judgment must be reversed.—Code of 1876, § 4990.

We have entered into the examination of the statutes, extending beyond the necessities of the present case, with the hope of directing attention to their provisions, that the practice may, in the future, be conformed to them.

The record does not disclose that the petitioner at the time of any decision adverse to him, *reserved* any question for the consideration of this court. The record does recite that to the judgment of the court overruling the motion in arrest of judgment, the defendant *excepts*. That judgment was not the subject of exception—a bill of exceptions would not present it for revision. Its correctness or incorrectness can not rest on matter *dehors* the record. Excepting, was simply *objecting* to the judgment, and not a reservation of the question for the consideration of this court.

The power of the City Court to suspend the execution of the judgment, was not general and unlimited. The power of the court to suspend, and the right of the prisoner to a suspension, depends on the fact which must appear of record, when the order of suspension is made,—that the defendant has reserved a question of law, for the consideration of this court. Unless this fact clearly appears, the court can not grant the suspension. The reservation must be made at the time of the decision of the question—it is the act of the defendant of which the court must be notified, that it may be introduced on the record, and justify the subsequent order suspending the execution of the judgment. Giving to the recital of the record, that the defendant excepted to the decision of the court, its largest significance, and it could indicate no more than that he had a present intention of reserving the decision for the consideration of this court, and would carry the intention into effect, thereafter by a bill of exceptions. It can scarcely mean more, and if it does not,

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it means an intent in the future to make the reservation, and not a *present, actual reservation*, complete of itself.

The City Court properly refused a suspension of the execution of the sentence, and the application for a *mandamus* must be denied.

May, Adm'r, *et al.* v. Kelly, Adm'r.

Action on Administration Bond.

1. *Administrator's bond; what necessary to maintain action in, by creditor of decedent.*—A creditor can not maintain an action at law on the bond of an administrator, until his debt or demand is first reduced to judgment or decree, by a court of competent jurisdiction; and such judgment, in the absence of fraud, is conclusive against the sureties, as to the existence of the debt.

2. *Same; effect of judgment as to different sets of sureties.*—Whether or not the judgment would have that effect against sureties subsequently joining the administrator in the execution of an additional bond, is immaterial, when they do not controvert the existence of the debt, and the only purpose for which the judgment is offered, is to prove its existence, and the duty of the administrator, resulting therefrom, to apply assets coming into his hands for the satisfaction of the debt.

3. *Administrator; additional bond of, liabilities of sureties on.*—When shortly before the execution of an additional bond, an administrator reported a sale of the lands of the intestate, and that he had received the purchase-money, and therein asking authority to make a conveyance, and the sale is confirmed, it not being shown that the money was disbursed before the execution of the additional bond, the presumption is, that the money remained in the hands of the administrator at the time of the execution of the additional bond, and the sureties thereon become responsible for its proper application.

4. *Administrator and sureties on bond; what chargeable with.*—An executor or administrator and the sureties on the official bond, are chargeable with the rental value of lands of the estate, which he failed to rent, when he could have done so.

APPEAL from City Court of Selma.

Tried before HON. JON. HARALSON.

Thomas Kelly, appellees' intestate, recovered judgment against Moody H. May, as administrator *de bonis non* of Robert Carlisle, deceased, for the sum of \$525. Execution issued on the judgment, to be levied of the goods and effects in May's hands to be administered, was returned, no property found; thereon, execution was issued against May to be levied *de bonis propriis*, which was returned, no property found, on the 19th day of April, 1874. In September, 1875, May had been duly required to give, and gave an additional

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bond, but Robbins was not a party to it. Afterwards, in March, 1876, May was required to execute, and did execute another additional bond, upon which Robbins, and others who were not sued, became sureties. Kelly, in 1877, brought suit, alleging that Moody had wasted and maladministered the assets, &c., and withheld money which ought to have been applied to payment of execution duly issued on the judgment in May, 1876, and returned no property in November, 1876.

The cause was tried by the court by consent of the parties, without the intervention of a jury.

On the trial it was shown that May became administrator of the estate of Carlisle on the 22d of November, 1871, and gave bond on that day; that on the 9th of December, 1873, Thomas Kelly recovered a judgment against May as administrator, and that executions issued on this judgment had been returned, "no property found;" that on the 9th of September, 1875, May gave an additional bond, under order of Probate Court, and, on the 13th of March, 1876, May, under a like order, gave another additional bond, on which Robbins became surety.

On the 18th of January, 1876, May reported to the Probate Court of Dallas county, in which the administration was pending, that in pursuance of the power conferred on him by act of the General Assembly, approved February 26, 1872, he had sold lands belonging to his intestate, situate in Chilton county, for the sum of six hundred and fourteen dollars, that the purchase-money had been fully paid, and asked that the sale be confirmed, and that he be directed to make a deed to the purchaser. The court confirmed the sale and ordered a conveyance to the purchaser. It was not shown what disposition had been made of the purchase-money thus reported to the court. It was shown that the estate of Robert Carlisle owned certain lands in Dallas county, which would rent for over two hundred dollars a year. May had not rented the lands for the year 1876. This was all the evidence, and the court found the issues in favor of the plaintiff, and further found, that May had wasted the assets of the estate of Robert Carlisle, to an amount equal to the plaintiff's judgment, and rendered judgment against the appellants for the amount due. The rendition of this judgment is now assigned as error.

W. M. BROOKS, for appellant.

W. R. NELSON, *contra*.

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BRICKELL, C. J.—There can be no doubt, that before a creditor can maintain an action at law on the bond of an executor or administrator, he must first have established his debt or demand by the judgment or decree of a court of competent jurisdiction; nor can it be doubted that such judgment or decree against the executor or administrator, in the absence of fraud, is conclusive evidence against his sureties of the existence of the debt. The appellants admit this to be true as to the sureties on the bond, at the time the judgment or decree is rendered; but insist it is true as to them only, and not as to sureties who subsequently join the executor or administrator in the execution of an additional bond—as to such sureties, it is urged, the judgment is *res inter alios acta*. The question is not of importance in this case. There was no attack on the validity of the judgment—no denial that the plaintiff had a just demand against the intestate of the defendant, May. The judgment was introduced for no other purpose than to prove its existence—the fact of its own rendition, and the legal consequences resulting—the duty and obligation resting on the administrator to apply the assets coming to his hands, to its satisfaction. To this extent, it was admissible against all the world, strangers, as well as parties and privies.—Freeman on Judgments, § 417; *Ansley v. Carlos*, 9 Ala.; 1 Starkie on Ev. 188.

Nor is it necessary to inquire whether the sureties on an additional bond given by an administrator, are liable for the past defaults of their principal, or for such only, as occur after the execution of the bond. The evidence showed that the administrator had about two months before the execution of the bond on which the suit is founded reported to the court of probate, the sale of lands of the intestate, and that he had received the purchase-money to an amount exceeding six hundred dollars; and asked a confirmation of the sale and authority to convey to the purchaser. True, this report is silent as to the time of the payment of the purchase-money, but that is immaterial—the money must then have been in the hands of the administrator, or he was not dealing fairly with the purchaser, to whom he was bound to return it, if the sale was not confirmed; and it can not be presumed by a waste or conversion of it, he had disabled himself from performing the duty. The sale was confirmed, and after its confirmation, the money became assets, primarily, liable for the payment of debts. Unless a waste or conversion is presumed, the money must have been in his hands, when the present bond was executed; for there

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was no attempt to show that it had been applied in the course of administration. Assuming as a fair inference, that the money remained in his hands, the sureties on the present bond, are bound for its just administration.

The evidence also showed that the intestate had lands in Dallas county unsold, of the probable value of fifteen hundred dollars, and of the annual rental value of two hundred and fifty or three hundred dollars. It was the duty of the administrator to have rented these lands. The statute conferred on him the power, and the power involved the duty; and for loss or damage resulting from a neglect of the duty, he and his sureties are liable.—*James v. Faulk*, 54 Ala. 184; *Pearson v. Darrington*, 32 Ala. 227. So far as is shown, without cause, he had neglected the duty for the year 1876; and for loss resulting from it, the sureties on the present bond are liable. It was a duty existing when the bond was executed, and continuing subsequently during the entire year. Adding the value of the rent, to the moneys in the hands of the administrator, and there were assets sufficient for the satisfaction of the plaintiff's judgment. The City Court so finding, rendered judgment against the appellants, and we think its judgment should be affirmed.

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Bill in Equity to ascertain Mortgage Debt, and for Foreclosure.

1. *Usury; how must be set up.*—One who has made usurious payments on a debt, can not obtain credits therefor, unless he distinctly and correctly sets forth in the pleadings, the terms and nature of the usurious agreement, and the amounts of the payments.

2. *Same; what allegations not sufficient to put in issue.*—A mortgagor who, upon dispute with the mortgagee as to the amount due, files his bill to ascertain the mortgage indebtedness, and for a sale of the property, if necessary for its payment—does not by the general allegation that “from time to time he has made various payments” on the mortgage debt, which reduce it below the amount the mortgagee claims, put in issue the right to credits for payments, beyond eight per cent. per annum, made to the mortgagee not as credits on the debt, but for forbearance, and to induce him not to foreclose, after the debt matured.

3. *Same.*—Nor in such a case, is the defect of the bill cured, by a consent decree directing the register “to state on account of the amount due the

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mortgagee upon the mortgage debt, allowing him eight per cent. interest upon the debt after maturity, and deducting therefrom all sums of money paid the mortgagee at the date of the several payments." Such decree, when tested and construed with reference to the pleadings, relates only to payments made as such, on the debt, and not to usurious exactions paid merely for forbearance.

4. *Amendment; when properly disallowed.*—After final decree settling the equities, a party is not entitled as matter of right to have an amendment allowed, which authorizes the introduction of proof effecting a different result; the chancellor may decline at that stage of the proceedings, to allow it.

5. *Attorney's fees; when may be included in mortgage.*—A stipulation in the mortgage, that the mortgagor, in addition to legal interest, shall pay to the mortgagee attorney's fees incurred in collecting the debt, will not render the agreement usurious; but a reasonable amount only can be collected, though a larger sum or per cent. is agreed on.

APPEAL from Montgomery Chancery Court.

Heard before Hon. H. AUSTILL.

The appellants, Marcus Munter and Henry Faber, composing the firm of Munter & Faber, filed this bill, in August, 1875, against the appellee, Charles Linn. The bill states in substance, that in January, 1870, appellants were indebted to Linn, mainly on account of the purchase of a store-house and lot in the city of Montgomery, and in payment of a balance due executed three promissory notes for \$8,500 each, due respectively on the first day of January, in the years, 1871, 1872 and 1873, secured by mortgage on said property, with power of sale, &c.; that "orators from time to time after the date of said mortgage, made payments to said Linn on the said debt, until at this time the balance due said Linn, does not exceed the sum of from four thousand to forty-five hundred dollars, while the mortgaged property is worth at least twenty-five thousand dollars, but said Linn claims that there is due him the sum of sixty-six hundred and fifty eight dollars, and under the powers contained in the mortgage, is proceeding to sell, and has advertised the property for sale; that complainants are ready and willing to pay the true amount which may be ascertained due; that the mortgaged property should, upon the ascertainment of the real balance due, be sold, if necessary, for the payment thereof." They further aver their willingness that a receiver be appointed to take charge of the property and receive the rents. The prayer of the bill is for an injunction, restraining Linn from selling the property, and that it be referred to the register to take and state an account between the parties, ascertaining the balance, if any, due by complainants, and that the property be sold to pay such balance, unless paid within a reasonable time, to be fixed by the court.

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Linn answered, admitting most of the allegations, but denying that he was claiming more than was due, and averring and insisting that there was due at the time of his proposed sale, the sum of \$6,658.56. By agreement of the complainants, his answer was taken as a cross-bill, asking for a foreclosure of the mortgage.

At the May term, 1876, "by consent of parties in open court," the chancellor decreed that the register "proceed to state an account of the amount due to respondent, Linn, upon his mortgage debt, allowing him eight per cent. interest upon his debt, after maturity thereof, and deducting therefrom all sums of money paid to said Linn at the date of the several payments, and that he report at the present term. All other questions are reserved until the coming in of the report."

A reference was had, and considerable testimony taken as to the number and amount of payments on the mortgage debt. The testimony, though conflicting, showed that Munter & Faber had, at various times after the debt matured, paid Linn certain sums of money, not as credits on the debt, but to induce him not to foreclose, and for forbearance, &c., when he was about to sell. Linn, however, claimed that the items were to cover his expenses in coming to Montgomery to confer with them about the matter, and for counsel fees, and advertisements, &c.

The register allowed most of these payments, though not all of them, and disallowed one item of credit claimed by complainants, and, upon the account as thus stated, found that the balance due Linn, amounted to a little over five thousand dollars. Both parties excepted to the report. Linn's exception, as to the credits allowed, was on the ground that they were "not established by the evidence before the register."

The court made a decree, which, after disallowing complainants' exception, proceeds as follows: "The main question raised by the exceptions of Linn to the report is, whether the register erred in allowing credits upon the mortgage debt on account of various sums paid by complainants to Linn as usurious interest. The court is of opinion that complainants did pay the several items described as usurious interest, and, while the testimony before the register is conflicting as to whether complainants were allowed credit for such items when the third note was paid, the court is of opinion that the register was correct in finding that such credits were not allowed. It was not the intention of the parties that such payments should be received as payments

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upon the mortgage debt; but, the question is, can complainants get the benefit of such payments under the order of reference, and under the pleadings in the cause? The original bill does not raise the question of usury. If complainants had set up such a plea, of course they would have been bound to offer the principal sum due, with lawful interest—else, the bill would have been demurrable. The court is of opinion that unless the plea of usury is clearly presented by the pleader, he has no right to raise it before the register on a reference such as we are now considering. The second and third exceptions of Linn are sustained. His other exceptions are overruled. It is therefore ordered that the report of the register be vacated and set aside. The matter is again referred to the register to ascertain and report the amount yet due Charles Linn. The register will not give credit to complainants in the original bill, on account of the sums paid as extra or usurious interest.”

The complainants, after due notice, asked leave to file an amendment, which they then offered. This proposed amendment avers that they paid Linn at various times, large sums of usurious interest, to-wit, \$3,000, to induce him not to foreclose, and for forbearance at different times, in excess of eight per cent. interest, which said Linn refuses to allow as a credit; that complainants “are willing to pay Linn, and hereby offer to pay said Linn his mortgage debt and legal interest, but pray to be allowed credit for all payments without legal consideration, or in excess of eight per cent. interest.” The chancellor refused to allow the amendment.

The register made another report, in obedience to this decree, ascertaining and reporting the balance due Linn at \$7,659.72. The chancellor confirmed this report, and decreed a sale, &c., and Munter & Faber appeal. They now assign as error the sustaining of Linn’s exceptions to the first report of the register, the decree ordering another reference; the confirmation of that decree, and the refusal to allow the proposed amendment.

The mortgage contains among other provisions, the following: “And in case it should become necessary to institute legal proceedings for the recovery of the amount of said notes or any part thereof, it is further agreed, and the said Marcus Munter and Henry E. Faber, hereby covenant to pay the fees of attorney-at-law, who may be employed for that purpose—such fee to be ten per cent. of the amount sued for and recovered.”

On the last reference to ascertain what was due Linn, no

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proof was made as to fees of attorney, and nothing reported by the register on that account. This report was not excepted to by Linn, but after its confirmation, he moved the chancellor to direct a reference, to ascertain the amount due on that account, but his motion was overruled.

Linn also appealed, and made a cross assignment of error by consent under the rules, assigning as error, the failure and refusal of the court to allow compensation for attorney's fees.

ELMORE & GUNTER, and WATTS & SONS, for Munter & Faber.

D. S. TROY, *contra*.

MANNING, J.—Appellants executed to appellee, Charles Linn, a mortgage of real estate in Montgomery, with a power of sale to secure the payment of a debt to him for borrowed money. And he being about to sell the property to pay a balance due, they filed their bill praying an injunction to restrain him from doing so, and that an account be taken to ascertain the amount really due,—and that a sale of the property to pay it, be made under the direction and control of the court, complainants alleging that they “from time to time after the date of said mortgage made payments to the said Linn on said debt, until at this time the balance due to said Linn does not exceed the sum of from \$4,000 to \$4,500,” while he is claiming of them, and about to sell the property to raise some \$2,000 more. The latter allegations the defendant denied: And it being agreed that his answer should be regarded as also a cross-bill setting up the mortgage and praying its foreclosure or a sale under it, to pay the debt, a decree by consent was entered, referring it to the register “to state an account of the amount due to respondent, Linn, upon his mortgage debt, allowing him eight per cent. interest upon his debt after maturity thereof, and deducting therefrom all sums of money paid to the said Linn at the date of the several payments.”

The sums which, it is contended, ought to have been, but were not credited upon the debt, had been voluntarily paid upon agreements entered into from time to time, according to the testimony, by way of *bonus*, or extra interest for indulgence in allowing delay in payment after the maturity of the debt, and not for the purpose of reducing it. It was, in fact, usury illegally charged and taken beyond the legal in

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terest, for the forbearance of the creditor to enforce payment of the debt when it became due.—*Matlock v. Mallory*, 19 Ala. 694; *Ferrier v. Scott's Administrator, &c.*, 17 Iowa, 578. But no averment was made in the bill of any such usurious dealing or agreements; nor was any statement made or particulars given of the sums of money so paid and received; nor was there any prayer that the payments thus made for one purpose should by decree of the court be appropriated to another.

The cases in which a debtor seeks to have moneys which have been usuriously given and accepted, applied as payments upon a debt to his creditor, are generally those, in which he, the debtor, is sued. And these cases most frequently appear in a court of equity, when the suit is brought by a mortgagee against his debtor for a foreclosure or sale under his mortgage, to pay the mortgage debt. No rules of proceeding are better established than that when this is done, the defendant debtor can not avail himself of sums he has paid for usury, as credits upon the debt, unless he has by his pleading, properly and perspicuously charged his creditors with having usuriously exacted or taken them, and set this up as *pro tanto* defense. The general rule, as stated in Tyler on Usury (p. 458) is, that the debtor "must in his answer or plea, both at law and in equity, set up the usury specifically, stating distinctly and correctly the terms of the usurious agreement and the amount of the usurious premium." And the pleader is cautioned to make this defense, "bearing in mind always, that the courts are more rigid and technical in their practice in cases of usury, than in ordinary cases of equity jurisdiction." This has proceeded in a large degree from a prejudice against this defense as "unconscientious." And some judges have perhaps, given more weight to this prejudice than should be allowed to it, by those whose duty it is to dispense justice according to law, with an equal hand. But however this may be, the rule that usury must be specifically and particularly set up by pleading, is too well established to be disregarded.—*Manning v. Tyler*, 21 N. Y. 567; *N. O. Gas Co. v. Dudley*, 8 Paige, 452; *Taylor v. Morris*, 22 N. J. Eq. 606; see, also, *Duckworth v. Duckworth*, 35 Ala. 70.

Now, appellants, who filed the bill under consideration, really occupy a position not so favorable as that of defendants. Having delivered to their creditor a mortgage of their property, with a power to sell it, he was proceeding legally by execution of this power to obtain satisfaction of the debt, when resisting him, they invoke the aid of the chancellor. Of course

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their bill should set forth the grievances in respect of which they claim relief. But since they make no complaint of any usurious dealing, and do not ask, or show any reason why they should ask, that any executed transaction between them and their debtor be set aside, all that the court could do, or that they pray it should do, is, to have the payments they have made to defendant upon the debt duly credited, and the property sold under its direction, to pay the balance proved to be due.

It is argued though by counsel for appellants, that whatever might have been the defect in their bill, it is obviated by the consent decree of reference which instructs the register in taking the account, to allow to appellee legal interest from the maturity of the debt, and to deduct therefrom all sums of money paid to the said Linn, at the dates of the several payments. But this means only payments that have been made as such upon the debt. The decree must be understood as founded upon and limited by the pleadings. And there being no complaint in them that appellants had paid to their creditor, upon contracts from time to time made with him for his forbearance, amounts beyond those which by law he was entitled to demand, nor any prayer to be released by a decree of the court from such executed contracts, and to have the moneys so used appropriated as credits upon the debt, the register was not at liberty to undo the past transactions of the parties, and make that application of such moneys. They were not the payments upon the debt which he was authorized to take into account in ascertaining the balance remaining unpaid.

The amendment offered to the bill, if sufficient under the rule in its averments and specifications, in our opinion, came too late to entitle complainants to have it allowed as a matter of right. On a former day of the term, the chancellor had decided the equities of the case made by the pleadings and evidence, when he, a second time, referred it to the register to take and state the account, and in doing so, instructed that officer not to give credit to complainants in the original bill for the sums paid as extra or usurious interest. The questions in the case, to which the proposed amendment related, had been decided by the chancellor, after which it was within his discretion to set aside that decision and permit the amendment, or to refuse to do so.

We find no error against these appellants, and the decree as against them must be affirmed.

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NOTE BY REPORTER.—At a subsequent day of the term, Messrs. Gunter & Blakey, and Watts & Sons, petitioned for a rehearing on behalf of Munter & Faber, and filed in support thereof, the following argument :

It is evident that there is no *discretion* in the chancellor to refuse an amendment, proper in itself, if it is proposed before *final decree*.—Code, § 5790. What is meant by *final decree* in this statute? The decree rendered by *consent* of the parties, was certainly not a *final decree in the cause*. Was it such a *final* decree as prevented the complainants from the *right* of amendment? What sort of a decree is final so as to cut off the *right* of amendment, and leave the matter in the *discretion* of the chancellor? It is decided that a decree is *final* for the purpose of allowing an appeal to the Supreme Court, when it settles “all the equities between the parties.”—1 Brick. Dig. 89, § 85; see, also, 32 Ala. 13; 24 Ala. 441.

Now, under this consent decree, were *all* the equities between the parties settled? The main equity in the case was in the *state of accounts* between the parties. The reference to the register was necessary to enable the chancellor to determine and decree the *equities between the parties*. This decree of reference determined nothing, *except* that the register should take an account; that he should, in taking the account, allow Linn interest on his debt, at eight per cent., after the maturity thereof; and that all sums of money paid should be credited as of the date of the respective payments. *All other questions were expressly reserved.*

There could not have been any decree settling *all* the equities between the parties, until the report was made and confirmed. Before this was done the amendment was offered. The amendment, in its allegations, was certainly a proper one, and the only possible objection to its allowance was the *time* at which it was offered. There having been no decree settling all the equities, the amendment should have been allowed as *matter of right*, and there was no discretion in the chancellor to refuse it.—See *King v. Avery*, 37 Ala. 169.

Was there any other decree, before the amendment was offered, which can be considered such a final decree? The decree of the chancellor on the exceptions to the report can not be considered final. The case was submitted to him on the exceptions alone. Under such submission, he had no right to settle anything except the exceptions to the report of the register. *The case was never submitted to the chancellor*

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for a decree on the equities of the case until after the amendment was proposed and rejected. So that the sole question on this branch of the case is, was the decree rendered by consent in May, 1876, a *final* decree within the meaning of the statute of amendment? Does this decree settle *all the equities* involved in the case? The state of the accounts between the mortgagors and the mortgagee constituted the basis on which the equity of the bill rested. How could the chancellor settle *this* equity, except through and on the facts reported by the register? Until this report was made, he had nothing before him on which he could make a decree settling the equities between the parties. *The matter of dispute between the parties was the amount due on the mortgage debt.* This dispute could not be settled except by taking an account, and thus ascertaining the truth of the matter. Now, if it be said that the part of the decree which directed the register, in taking the account, to allow Linn eight per cent. interest on the mortgage debt, after maturity, settled one of the equities, still there were other equities, which could only be solved on the coming in of the report of the register.

If it be said that the portion of this decree which declared that, in taking the account, the register should deduct all sums of money paid to Linn at the date of the respective payments, settled another equity, still there was left to be settled the equity which arose from the state of the accounts, as developed by the report of the register.

There are but three things settled by this decree:—*first*, that an account should be taken by the register; *second*, that he should allow Linn eight per cent. interest on the mortgage debt from maturity thereof; and *third*, that Munter & Faber should be allowed all payments as of the dates thereof. “All other questions are reserved until the coming in of the report,” is the express language of the decree.

This would seem to exclude, expressly, all idea that it was to be, or could be, considered a final decree, settling “all the equities between the parties.” And thus it is demonstrated that it is not such a final decree as cuts off the *right* of amendment. If, therefore, there was any necessity for the amendment, it was in time, and ought to have been allowed, by the imperative injunctions of the statute.

There are some further matters in this case, to which we respectfully call the court’s attention:

The decree of the 17th day of May, 1876, was by *consent*, the meaning of which we take is, that its *terms* were fixed

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by the *convention* of the parties. This convention of the agreement of the litigants was made, too, about their own matters, concerning which they should be presumed to be well informed, and therefore to have understood *their own purposes and intentions*.

The facts show that these parties *each* construed the language of the decree in one and the same way, and acted on that construction, and if the words might well be so construed, what *right* has the court, of its own motion and without notice of such purpose, to place a totally different construction on it, and thus in effect to make a decree of its own, in lieu of the real consent decree? Linn's objection to the allowance of the credits, was because they were not *established by the proof*—not because it was without the scope of the reference. All the acts of the parties show that they construed the decree, as authorizing an inquiry into *all* payments.

Now, the next question is, does the construction put on the consent decree by the parties do violence either to the grammatical or legal import of the *words* of that decree?

Could not "sums of money" paid to Linn as interest in excess of eight per cent. be as well included under the words "sums of money paid to the said Linn," as "sums of money" paid to him as interest at or under eight per cent.? The things to be deducted from Linn's debt were "sums of money paid to the said Linn," and money received by him from the complainants as *interest* on their debt to him is certainly within the *possible* meaning of the words.

And, further, can we not even maintain that the most *probable* meaning of the *words* of the decree is the same as that put upon them by the parties and the register, viz., that the true direction of the decree to the register was to take an account between the parties in which the defendant, Linn, should only receive legal interest, and in which the complainants should have credit for all payments, whether made to cancel legal or usurious interest?

It should be recollected that the decree was made in a cause in which the controversy between the parties was concerning the allowance or disallowance of *credits* claimed by complainants and denied by Linn; that the only credits about which there was any difference were the usury payments; and that the parties understood and agreed that the real questions involved should be considered and determined without special pleading; for the defendant, by agreement, was to have the benefit of his answer as a cross bill. Un-

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der these circumstances, to save time, perhaps, it is agreed that the register shall report the state of accounts between the parties, and it is expressly provided that Linn shall have eight per cent. This, under the circumstances, can only be construed as meaning that he should not have more than eight per cent. on his debt.

Moreover, usurious payments are payments on the debt, *in every sense of the word*, as much as payments of legal interest are. It is the agreement, express or implied, of the parties which makes the corpus of a debt bear eight per cent. interest—and thus this per cent. becomes a part of the debt itself. The same agreement, though in this case it must be express, makes any *extra* interest beyond eight per cent. also a part of *the debt*. And when paid, it diminishes the debt that much, since the debt by consent was increased by the *extra* interest before the payment was made.

The payments made, then, in the way of *extra* or usurious interest, are in every sense of the words payments on *the debt*, and the parties made and received them as such; but, as stated above, the debt itself was increased by the agreement to pay the *extra* interest.

The decree in this case, while carefully providing that the payments of money to the defendants should be allowed, as carefully provides that the debt of the defendants shall not be increased by usury.

But, it is said that the pleadings, as actually filed, did not authorize Munter & Faber to insist on usury. Did Munter & Faber, in fact, insist on usury?

There was no usury in the notes provided for by the mortgage, and the mortgage itself expressly provides that each one of the notes shall bear eight per cent. interest after maturity. The expressions of this rate of interest *after maturity* is equivalent to a contract between the parties that *no more or greater* interest should be exacted by Linn on the mortgage debt, *after maturity*, for any "forbearance" or delay in collecting or foreclosing the mortgage; and if Linn, after the maturity of the mortgage debt, required a greater sum than the legal rate for any "forbearance," he not only violated his *contract*, but he violated the *law* against usury.

Now, under the decree of the 17th of May, 1876, the complainants, before the register, simply introduced evidence of their payments to Linn on the mortgage debt. They had a right, under the decree and under the law, to have all payments on account of the mortgage debt or on all contracts

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for forbearance in collecting it, deducted from the mortgage debt.

A payment, intended as a payment of usurious interest, made before the payment of the principal, is to be considered as made on account of the debt for which the debtor is legally liable. The law regards all agreements made by a debtor not to claim usury, which he has agreed to pay, as made under coercion of the creditor, and when paid, the payments must be credited on the amount the *law allows the creditor to collect*. The law applies the payments to the debt, although they may be made on a usurious agreement for forbearance.—*Booker v. Gregory*, 7 B. Mon. 430; *Farwell v. Meyer*, 35 Ill. 40; *Hunter & Hatch*, 45 Ill. 184; *Jones v. Bond*, 8 Smedes & M. 368; *Goodhue v. Palmer*, 13 Ind. 457; *Knapp v. Briggs*, 2 Allen, 551; *McAllister v. Jermon*, 32 Miss. 142; *Threadgill v. Timberlake*, 2 Head, 396; *Davis v. Converse*, 35 Vt. 503; *Browning v. Thompson*, 13 B. Mon. 387; *Nichols & Bliss v. Bellows*, 22 Vt. 581; *Shroeppe v. Corning*, 4 Denio, 236; *Dey v. Dunham*, J. Johns Ch. 191;

After a transaction has been in part closed, but the same is so far open that the debt is unpaid, a court of chancery, in stating the account, will allow a credit for usurious interest previously paid.—See *Parmelee v. Lawrence*, 44 Ill. 404; *Ward v. Sharpe*, 15 Vt. 118; 35 Vt. 503; *Johnson v. Thompson*, 28 Ill. 352; *Ware v. Bennett*, 18 Tex. 794; *Farwell v. Meyer*, 35 Ill. 49; *Booker v. Gregory*, 7 B. Mon. 430; *Fox v. Taliaferro*, 4 Munt. (Va.) 243; *Cole v. Hills*, 44 N. H. 227; *Gill v. Rice*, 13 Wis. 549; *ib.* 589.

In *Minnott & Sawyer*, 8 Allen, 78, it was held that the payment of usurious interest, under a verbal contract, could not be deducted in a suit on the note, but it was so held because the statute of Massachusetts provided a different remedy.

Our statute expressly declares, "that if any interest has been paid, the same must be deducted from the principal."

Now, before the register, the complainants, Munter & Faber, proved certain payments not credited by Linn on the mortgage debt. They had the right to make such proof and to have these payments credited, unless there is some valid reason why they should not; for they come under the express directions of the chancellor to the register. Linn, however, objects to the allowance of these payments, because, as he says, *they* were made to him for interest over and above the legal interest, exacted by him for and on account of "forbearance" and time given Munter & Faber in col-

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lecting the mortgage debt and in foreclosing the mortgage. Then, it is not Munter & Faber who plead usury; but it is Linn, who sets up the usury against the allowance of these payments as credits on the mortgage debt. But for Linn's suggestion of the usurious contract under which these payments were made they must have been applied to the mortgage debt. They were made on account of the mortgage indebtedness due by Munter & Faber to Linn. In order to avoid the effect the law attaches to these payments, viz., the reduction of the mortgage debt to the extent of the payments, Linn says "*these payments were made to me*, in addition to the legal interest, in consideration of time, 'forbearance' given to them, and to prevent me from selling the mortgaged property for the payment of my debt." Is this any legal reason for not allowing the payments as credits on the mortgage debt? The register allowed these payments. Suppose Linn had sued Munter & Faber on their notes in a court of law, and Munter & Faber had simply pleaded *payment*, or had offered evidence of payment under the general issue, as they might have done,—it would not have been necessary, in a plea, to aver that these payments had been made under a usurious contract, setting forth specifically the times and terms; a simple plea of payment would have been good. Could Linn have replied, either by formal replication or by evidence, that such payments were made to him for *interest* over the legal rate, in consideration of "forbearance," and that they ought not to be allowed as payments on the mortgage debt? Could he plead or set up his own violation of the law to avoid the effect which the law attached to the payments made? The agreement thus made to delay the collection—to forbear—was certainly *usurious*.—See *Mallory v. Matlock*, 19 Ala. 694.

"Were such agreements to receive the sanction of the law, the statutes against usury would be, in many cases, perhaps the greatest number, utterly impotent to effect the end proposed." "It has long been settled that cases of usury are not confined to precise loans of money, but they extend to cases where the relation of debtor and creditor exists." *Mallory v. Matlock*, *supra*, page 697. Did not the relation of debtor and creditor exist between these parties at the time this agreement for "forbearance" was made? Were not the amounts received in payment as a consideration for delay or forbearance in collecting the mortgage debt? Undoubtedly. But it is unnecessary to argue this further, for it is conceded in the opinion delivered in this case that these payments

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were made under a usurious contract. This being conceded, the statute declares that these payments shall be applied to the principal debt, disregarding the usurious contract.

It must not be overlooked that the notes covered by the mortgage were not founded on any usurious contract, and there was no usurious interest included in them. If Munter & Faber had been sued on them, they could not have pleaded usury; and in such cases, it would not have been necessary for them to plead usury in order to have the benefit of payments made on the mortgage debt.

MANNING, J.—However correct in regard to several propositions discussed in it the argument for a rehearing of this cause may be, yet it does not, we think, meet and answer the propositions relating to the pleadings and manner in which appellants presented their case, upon which the opinion and decision of this court were founded.

It is because the bill does not refer to and assail the agreements between the parties for postponing foreclosure under the mortgage, and does not claim that the *extra* sums paid from time to time, in consideration of such postponements, should be applied as payments upon the mortgage debt, that those matters were held by us to be not put in issue. And in respect to the consent decree, as it also did not specify what payments were to be credited on the mortgage debt, we construed it by reference to the bill upon which it was based, as authorizing those payments only to be credited, which were made and received as payments upon that debt, and not those which had been made in fulfillment of the subsequent collateral usurious contracts for its extension, not mentioned in the pleadings.

In regard to the proposed amendment of the bill, counsel for appellant insist that it did not come too late. Clearly, after the second decree of reference was made, there remained no further question to be settled for the determination of the rights of the parties. Both the bill filed by appellants, and the answer of their creditor, Linn, admitted and affirmed the existence of the debt of the former to him, and of the mortgage to secure it; and in their bill the debtors themselves prayed, and their creditor consented that the amount of the debt be ascertained, and the mortgaged property sold to pay it, under the direction of the court. In respect to these matters, both sides concurred. There was no question of equity open, except that which related to the payments that should be credited. And that was set-

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tled when the chancellor in his second decree of reference, said: "The register will not give credit to complainants in the original bill, on account of the sums paid as extra or usurious interest," which were the sums paid from time to time, upon the subsequent agreements for the extension of the term of credit and foreclosure. Yet it was one day after this determination of that matter, and after the register had made his final report under that order—when nothing remained for the chancellor to do, but confirm the report and order the sale—that the application was made so to amend the bill, as to throw open the cause for investigation again, and upon other issues, from the beginning. Whether this should then be done was, we think, a question which the chancellor was entitled to decide according to his sound discretion.

Application for rehearing denied.

The following opinion was delivered on the cross-assignment of error made by Linn.

MANNING, J.—In the cross-appeal of Linn in this cause, it is assigned as error, that he was not allowed his attorney's fees, according to the agreement that "if it should be necessary to institute legal proceedings for the recovery of the amount of the notes," Munter & Faber should pay the attorney who might be employed for the purpose, his fees; such fees to be ten per cent. on the amount sued for and recovered."

Except in Kentucky, where it is ruled differently, it has been generally held that an agreement to pay the reasonable attorney's fees, to which a lender of money would be put, if he should have to sue for it, in addition to the legal interest, is not usurious. The creditor, though, would not be permitted to make a further profit to himself by stipulating for a larger sum or per cent. than the reasonable fees he would have to pay. In the present case, the compensation of the lawyer is put at *ten per cent.* The contract to pay it was made with Linn. No attorney was a party to it, or is a party to this cause. The money was payable to Linn for his reimbursement of the sum he had paid, or would have to pay to his attorney, and constituted a part of what he was entitled to recover from his debtors, the amount of which the register was ordered to ascertain and report. And since it was not proved and included in the amount he reported, and the report was confirmed without any exception to it

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made by Linn, he is thereby concluded. The motion afterwards made when the cause was about to be finally disposed of, was addressed to the sound discretion of the chancellor. Let the decree of the chancellor be affirmed.

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Bill in Equity to Enjoin Sale under Mortgage.

1. *Bill to enjoin sale under mortgage; when demurrable*.—A mortgagor seeking to enjoin a sale, under a power in the mortgage, on the ground of usury, must either bring the money and interest into court, or must by his offer submit himself to the jurisdiction of the court, that it may do complete equity between the parties; otherwise, his bill is demurrable.

2. *Same*.—Where the bill contains such offer, a decree of foreclosure may be made without any cross-bill; and a cross-bill being unnecessary, it is immaterial whether a cross-bill was formal, or had been properly put in issue.

3. *Receiver; when evidence as to necessity of appointing, will not be closely scrutinized*.—Where the mortgagor who agreed, in the mortgage, to insure the property, pay taxes, and keep it in repair, failed to do so, and was shown to be insolvent, this court will not closely scrutinize conflicting evidence, as to the value of the mortgaged premises, upon which a receiver was appointed.

4. *Same*.—Answers prayed to be taken as cross-bill in such a cause, whether put at issue or not, authorize the complainants in them to move for a receiver.

5. *Brokerage in addition to interest; when will not render loan usurious*.—Where a loan is negotiated through a broker, who, by arrangement with the borrower, received commissions for effecting the loan, the fact that the broker allowed the lenders to share in such commissions, in order to induce them to take the loan, will not brand the transaction as usurious, when it is shown that such action on the broker's part was a mere gratuity, and not part of a scheme to avoid the laws against usury.

5. *Usury; what will not avoid*.—A mere renewal of the debt or change of securities, between the same parties, will not purge the usury; and where one shown to have already loaned money to complainant at usurious rates, takes another loan and security, which she assails as a mere renewal of the old usurious debt with change of security, he must make good his defence by clear and satisfactory proof, that the second transaction was not part of a device to avoid the usury laws.

APPEAL from Chancery Court of Mobile.

Heard before Hon. CHARLES TURNER.

The appellant, Celestine Eslava, filed her bill against W. F. Stoutz, A. E. Buck, Manuel Primo and O. L. Crampton, the appellees, and sought to enjoin a threatened sale of certain property by O. L. Crampton, under mortgages executed to him by appellant. The bill charged that the appel-

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lant, some time in the year 1870, commenced borrowing money from Wm. F. Stoutz, and that during that year she borrowed various sums from him at rates of interest, varying from twenty to twenty-four per cent., and that in June, 1872, she executed a mortgage to secure said indebtedness on a certain piece of property belonging to her, known as the Walsh, Smith & Co. store.

There were two mortgages on this piece of property, and W. F. Stoutz represented to appellant that he was anxious to have the mortgage to him paid and settled, and he could borrow for her from O. L. Crampton, fifteen thousand dollars, at twelve per cent. interest—twelve thousand five hundred dollars to be paid at once and twenty-five hundred dollars shortly. The bill then charges that the appellant consented to this, and upon the report of Stoutz Bros., a firm composed of Wm. F. and F. A. Stoutz, that Crampton had loaned the twelve thousand five hundred dollars, she executed to Crampton on the 7th day of June, 1872, a mortgage, on property other than the Walsh, Smith & Co. store, for twelve thousand five hundred dollars, and at the same time executed and delivered to Crampton three notes for forty-five hundred dollars each, said notes being nominally for the sum of twelve thousand five hundred dollars, and one year's interest at eight per cent. Both notes and mortgage had one year to run. On the 6th day of July, 1872, she executed another mortgage on the same property to Crampton for the sum of twenty-five hundred dollars, and at the same time she gave three notes for nine hundred dollars each, due one year after date, said notes being likewise for the nominal loan of twenty-five hundred dollars and eight per cent. interest thereon. The bill then charges that the mortgages do not speak the truth, and that Crampton never in fact lent more than ten thousand dollars, and the arrangement was a device and contrivance by which to obtain a better security for the debt due W. F. Stoutz, and that all parties had the notes and mortgages executed as shown above, in order to conceal the real loan then made. It is alleged that under this arrangement, five hundred dollars of the amount covered by the notes were never paid, but that the same was put in the shape of a commission to F. A. Stoutz, for negotiating said loan; that the other five thousand dollars was in fact nothing but the old usurious debt due W. F. Stoutz and secured by a third mortgage on the Walsh, Smith & Co. store, and the reputed loan of fifteen thousand was really a device on the part of W. F. Stoutz

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and F. A. Stoutz, who were brothers, to secure a mortgage on the property now in controversy, in place of the third mortgage described above. Each of the mortgages to Crampton bound appellant to keep the mortgaged premises in repair, to insure the same for the benefit of the mortgagees, pay the taxes accruing, and each contained a power of sale in default of the payment of the notes secured by them. It was also alleged that under the power of sale, Crampton had advertised the property, and announced his intention to sell the same to pay the mortgage debt. Sworn answers were required, and each defendant so answered.

A. E. Buck in his answer denied any knowledge of the usurious loans to appellant by W. F. Stoutz, and alleged that he was applied to by F. A. Stoutz to loan appellant some money, to be secured by the mortgages attacked in this case; that by the consent of his wife, Ellen B. Buck, he invested money belonging to her to the extent of one-third of the loan, secured by the two mortgages to Crampton, and that he received from Crampton two notes of appellant, one for \$4,500 and the other for \$900; that the papers were prepared and produced signed and acknowledged by appellant, by F. A. Stoutz, who acted for her in all the negotiations in every way; that the money was paid over to F. A. Stoutz as her agent. The answer then alleged that though there are two mortgages, they are parts and parcels of one transaction, and that by express understanding with Buck and Crampton, F. A. Stoutz held back \$2500 to clear an encumbrance on the property, in the shape of a tax title held by one Wilson, they being unwilling to loan the whole amount until the matter was settled; that the tax title was purchased by F. A. Stoutz as agent for appellant, and the balance of the loan was then secured by the mortgage dated on the 6th of July, 1872. He denies that there was any contrivance on his part to disguise any usurious transactions with W. F. Stoutz, or to aid him to obtain better security for his debt, and alleges that he understood at the time that out of the money paid to F. A. Stoutz, said Stoutz, acting for appellant, had paid off the old mortgage held by W. F. Stoutz, and that said W. F. Stoutz would take a third interest in the mortgages to Crampton. He denies all usury in the debt secured by the Crampton mortgages, and alleges that the notes held by his wife represent the money actually loaned and legal interest thereon, and that the transaction was *bona fide* and legal. He sets up the failure of the mortgagor to pay taxes on the mortgaged premises, or to keep

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the same in repair, and insured for the benefit of the mortgagee as required to do by the mortgages, and alleges that Crampton had been compelled to pay insurance on the premises, the parties interested in the mortgages furnishing the means. He prays that a foreclosure in favor of Ellen B. Buck, if she be made a party, and a sale of the property under the direction of the court. Incorporated in his answer is a demurrer, assigning two causes: 1st, "That Ellen B. Buck is not made a party defendant," and, 2d, "For want of equity, as the complainant does not offer to pay any sum whatever, not even the money she admits to be due."

The answer of William F. Stoutz gives the same accounts of the execution of the Crampton mortgages as set forth in the answer of A. E. Buck; denies that he had any connection with the negotiations resulting in the loan secured by said mortgage, except to furnish one-third of the consideration money of the mortgages, and alleges that the transactions were in all respects legal and *bona fide*. He further denies any agreement to disguise any usurious transaction, or that the Crampton mortgages are tainted with usury, and alleges that the mortgage held by him on the Walsh, Smith & Co. store, the consideration of which he admits was money loaned appellant at twenty to twenty-four per cent. a year, "had been fully paid out of moneys paid to F. A. Stoutz by Crampton and Buck, and afterwards said money was reinvested by W. F. Stoutz in the new loan and security; that the sum so paid was credited on the books of F. A. Stoutz, to Crampton as part of the fifteen thousand dollars; that there was no connection between the mortgage held by him on the Walsh, Smith & Co. store and the Crampton mortgages, except in investing the money received on the old mortgage in the new loan." He alleges that he did not receive the note for forty-five hundred dollars until after he had cancelled and delivered the mortgage on the Walsh, Smith & Co. store to the agent of appellant, and that he did not receive the nine hundred dollar note until a month afterwards. Attached to his answer is an account between F. A. Stoutz and appellant, marked "special account," in which F. A. Stoutz charges himself, under date of June 7, 1872, with "cash of O. L. Crampton, \$15,500," and on the same day claims credit for "commissions, 4 per cent." \$500, and for "cash paid W. F. Stoutz in full," \$4500.

He further avers that "the original real parties in interest in said mortgages, were said O. L. Crampton, Mrs. Ellen B. Buck, wife of the Hon. A. E. Buck, and your respon-

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dent." The breach of the conditions of the mortgages in relation to keeping the mortgaged property insured and repaired, and the taxes thereon paid, is averred; the answer then prays that the mortgages given to Crampton be foreclosed for the benefit of the parties secured by it. A demurrer is also incorporated in this answer, for want of equity, "as the said complainant does not offer to pay the sum due or any part thereof, and does not offer to pay even the sum she admits to be due."

Crampton's answer denies any knowledge of the usurious transactions between W. F. Stoutz and appellant, or of what was the consideration of the mortgage held by Stoutz on the Walsh, Smith & Co. store, and avers that pending the negotiations, which resulted in the making and delivery of the two mortgages to him, he heard that there was such a mortgage, but he was informed before said mortgages were actually made, that said mortgage was paid and cancelled, out of the money paid to F. A. Stoutz, by himself and Mrs. Buck; that W. F. Stoutz had become interested to the extent of one-third in the two mortgages to him, by reinvesting the money therein. The answer alleges that the whole transaction was negotiated by F. A. Stoutz, as the agent of appellant, and gives the same account of the execution of the two mortgages as that stated in the answer of A. E. Buck. He then denies that he was a party to any device or agreement to aid W. F. Stoutz to obtain a better security for his usurious debt, and alleges that the transactions which led to the execution of the mortgages to him were in all respects *bona fide* and strictly legal. His answer proceeds: "As to the commission of six hundred dollars allowed to said F. A. Stoutz, respondent understood at the time that said Stoutz charged commissions, which had been agreed to by said complainant, and as said Stoutz received all the money he had only to charge the commissions to his principal, as part of the money received. Said sum so charged respondent regards as reasonable." It is alleged in his answer "that the notes and mortgage of complainants are held by Manuel Primo, Mrs. E. B. Buck, and the said W. F. Stoutz, one-third each, respondent having, on the 1st of October, 1872, sold his interest to said Primo, who had no knowledge, that respondent knows of, of any of the matters alleged in said bill, concerning the negotiation of said loan and the making of said mortgages and notes.

His answer then admits that he now holds the mortgage as the trustee of the parties in interest, and alleged the fail-

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ure of the mortgagor to comply with the covenants of the mortgages, as to repairs and taxes on the mortgaged premises, and as to keeping the same insured for the benefit of the mortgagees, and that by reason of her failure in this respect he had been compelled to pay taxes and insurance on the property to the amount of \$469.50, which amount was furnished to him for that purpose by the parties owning the mortgage debt. His answer then avers that the mortgaged property does not exceed twenty thousand dollars in value, and that the bond given by complainant to secure the injunction in this case (which was for the sum of \$500) was insufficient for the protection of the parties in interest, that the complainant is insolvent, and was wasting the rents, failing to pay taxes and suffering the property to deteriorate to their detriment, and that if she was allowed to continue in possession of the mortgaged premises and receive the rents, the property would not bring enough to secure the debts secured by the mortgage, and prayed that a receiver be appointed to collect the rents, pay taxes on the mortgaged property and keep the same in repair, until the final decision of the cause. He likewise demurred to the bill on the same grounds as the other respondents. Manuel Primo answered, setting up that he was a *bona fide* owner of two of the notes secured by the mortgages, having purchased the same from Crampton for a valuable consideration, and without notice of any of the transactions which had led to their execution. No process was issued on these answers as cross-bills. Soon after the filing of these answers the respondents moved the register in vacation to appoint a receiver, and in support of the motion filed numerous affidavits as to the value of the mortgaged premises and the solvency of the complainant. By these affidavits it appears that judgments against appellant have been returned "no property"; that various suits are pending against her, and the value of the mortgaged premises is fixed, by the persons making the affidavits, at from \$15,000 to \$20,000. There were counter affidavits which place a value on the property varying from \$25,000 to \$40,000. The register denied the motion for a receiver and an appeal was taken from his decision to the chancellor in vacation, who ordered the appointment of a receiver, who took possession of the property. An amended bill was then filed, which is substantially the same as the original in the particulars necessary to the decision in this cause and which contains the following clause: "And she says that she is ready and willing to pay whatever sum may be actually and

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truly due to the parties severally interested in her said mortgage notes, allowing to your oratrix such abatements as she may be entitled to by law, and she tenders to pay any sum which may be found due by her to said parties in interest, and she submits herself to this court in that behalf."

The amended bill admits that Mrs. Eslava has failed to pay taxes on the mortgaged premises or to have the same insured, and that she had disposed of some of the rent notes before maturity, and makes Mrs. Buck a defendant. The appellees severally answered this amended bill, averring in the answers substantially the same facts as in their answers to the original bill. In his answer to the amended bill, Wm. F. Stoutz, in explaining how he acquired his interest in the Crampton mortgages, after stating that the usurious debt secured by the Walsh, Smith & Co. mortgage was due, and that he was pressing the appellant for a settlement, and threatened to have the mortgage foreclosed, alleges the agent of appellant informed him that he would obtain a loan and pay the same, and uses the following language: "In accordance with this understanding, said mortgage debt was paid and satisfied out of the moneys paid to F. A. Stoutz by said Crampton and Buck, and respondent then purchased with said money the note of forty-five hundred dollars, and deposited with said F. A. Stoutz eight hundred and thirty-three dollars, to invest in said note of nine hundred dollars, each having twelve months to run. Previous to said purchase and investment, the old note and mortgage of the first of February, 1871, was given up and cancelled, and was put into the possession of F. A. Stoutz for Mrs. Eslava."

The only testimony, except the sworn answer of the respondents, was the deposition of F. A. Stoutz, and in it he gives a full itemized account of his disbursements of the fifteen thousand dollars raised for Mrs. Eslava on the mortgages, he entered and claimed the following credit: "To Wm. F. Stoutz, in settlement of mortgage, \$4,500."

In his testimony, F. A. Stoutz, both in direct and cross-examination, states that he received from the parties in interest on said mortgages, the amount in *cash* or its *equivalent*, and that he paid out the same by the order of the general agent of appellant. He also testified that his payment of part of his commissions to the lenders of the money, was but a gratuity on his part in his desire to accomplish the loan.

On the hearing, the chancellor was of opinion that the

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complainant was not entitled to relief, and that the respondents were entitled to a foreclosure of the two Crampton mortgages, which was accordingly decreed, and a sale of the mortgaged property ordered. The appointment of the receiver, the decree rendered, and that the cause was not at issue on the cross-bill, are here assigned as error.

GEORGE N. STEWART, for appellant.

BOYLES & OVERALL, *contra*.

[No briefs came into Reporter's hands.]

STONE, J.—The case of *Rogers et al. v. Torbut et al.*, 58 Ala. 523, presented substantially the same question as that which meets us at the threshold of this. In that case, as in this, the bill was filed by mortgagors, charging that there was usury in the debt secured by the mortgage, and seeking to arrest a sale, threatened to be made under a power contained in the mortgage. In that case a question was made on the averments of the bill. We declared the rule in such case to be, "that a complainant asking such relief, must either bring the money borrowed and interest into court, or he must, by his offer, submit himself to the authority and jurisdiction of the court, so that without more, the court may compel him to do equity, as a condition upon which the relief prayed will be granted. This is the spirit, this the sense of the rule." We said also, "without this offer, the complainants would have had no standing in court, and their bill would have been demurrable."—*Branch Bank of Mobile v. Strother*, 15 Ala. 51; *Nelson v. Dunn*, 15 Ala. 501.

The bill in the present case, as amended, contains the following clause: "And she also says that she is ready and willing to pay whatever sum may be actually and truly due to the parties severally interested in her said mortgage notes, allowing to your oratrix, such abatements as she may be entitled to by law, and she tenders to pay any sum that may be found due by her to said parties in interest, and she submits herself to this court in that behalf." Under the rule declared in our former decisions, cited above, the Chancery Court was authorized to ascertain the amount due, and to decree a foreclosure of the mortgages, without any cross-bill whatever. So, we need not inquire whether the cross-bill in this case was formal, or had been put at issue. There is nothing in this assignment of error.

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The answers as amended, or some of them, are prayed to be made cross-bills. Whether these cross-bills were ever put at issue or not, they authorized a motion by complainants in them, for the appointment of a receiver. Much testimony was taken by affidavit on the question of the value of the mortgaged property. Many witnesses testified to a value which would be amply sufficient to secure the debts, while many others fixed the valuation below that sum. Uncontradicted evidence establishes the following facts: That Mrs. Eslava is insolvent, owing many debts in judgment, on which there is return of execution, "no property found;" that when she executed the mortgages, she bound herself to keep the property under insurance, and the taxes paid, and she had failed to observe and keep each of these promises, and that the mortgagees had been forced to pay for the insurance, and also to pay the taxes to prevent a sale of the property. It was also shown that the property was allowed to suffer for want of repairs, and that the rent notes were disposed of, before their maturity. In view of these damaging facts, we are disinclined to reverse, or scrutinize narrowly the finding of the chancellor that the mortgage security was insufficient and insecure. He did not err in the appointment of a receiver.

In lending the money and taking the mortgage, Crampton, acting for himself and Mrs. Buck, is not shown to be guilty of the offense of usury. In the sworn answers of defendants, and in the testimony of F. A. Stoutz, it is shown that each of these parties lent to Mrs. Eslava five thousand dollars in cash, and took notes due at twelve months for that sum with eight per cent. added, making fifty-four hundred dollars each. True, this witness says that by pre-arrangement, he, the witness, as a broker, was to be paid four per cent. commissions for negotiating the loan, and relieving the property from taxes and other incumbrances; and it is shown that this fund, in whole or in part, went to the lenders. If this was a device or artifice to secure a greater rate of interest than eight per cent. *per annum*, then, it would brand the transaction as usurious. Only the testimony of F. A. Stoutz bears directly on this question. He testifies positively that such was the agreement under which he performed the services; that they were worth this sum, and that it was gratuitous on his part that Crampton and Mrs. Buck shared in this fund. There is no other testimony on this question. If this statement is not true, Mrs. Eslava, or her agent Jules Eslava, could have controverted it. They have

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not testified. The present record fails to show any usury in the claims of Mrs. Buck, and of Crampton, now held by *Primo*.

The third of the mortgage claim, held by William F. Stoutz, stands on a different footing. He had been a previous creditor of Mrs. Eslava, for money lent at usurious interest. The theory of his defense to the charge of usury is, that his older demand was liquidated with money raised from Crampton on the mortgages, and that he, William F., subsequently took a third interest in the mortgage loan. We have no doubt the parties understood the rule of law, that the renewal of a usurious contract does not purge it of the taint, and that they attempted to escape that result. The answers, and the general statement of the witness F. A. Stoutz, are to the effect that the usurious debt to Wm. F. was first paid, and that he, William F., subsequently took an interest in the mortgage loan. But when the facts are scrutinized, it is shown that this is an erroneous conclusion. It is shown in the record that Crampton and Mrs. Buck each paid or lent five thousand dollars, and only five thousand. It is no where said that William F. Stoutz paid or lent any money. F. A. Stoutz testifies that the fifteen thousand dollars were paid to him in money *and its equivalent*. He repeats this remark in his cross-examination, and never informs us in what this "equivalent" consisted. Wm. F. Stoutz, in his answer, says: "In accordance with this understanding, said mortgage debt, [the part, usurious debt to Wm. F.,] was paid and satisfied out of the moneys paid to F. A. Stoutz by Crampton and Buck, and respondent then purchased with said money the note of four thousand five hundred dollars, and deposited with said F. A. Stoutz, eight hundred and thirty-three dollars, to invest in the note for nine hundred dollars, each having twelve months to run. Previous to said purchase and investment, the old note and mortgage of the first of February, 1871, was given up and cancelled, and was put into the possession of F. A. Stoutz for Mrs. Eslava." In F. A. Stoutz' deposition, giving a full, itemized account of his disbursement of the fifteen thousand dollars raised for Eslava on the mortgages, he entered and claimed the following credit: "To Wm. F. Stoutz in settlement of mortgage \$4,500.00" The theory of this defense is, that Wm. F. Stoutz, after collecting, through the money raised on the mortgages, his old usurious debt of forty-five hundred dollars, then purchased a third interest in the fifteen thousand dollars, new mortgage loan. How, "with said money,"

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\$4,500.00, collected on the old debt, Wm. F. Stoutz paid \$5,000.00 one-third of the new mortgage loan of fifteen thousand, is not attempted to be explained. And yet, in W. F. Stoutz' original answer in this cause, he says "the original real parties in interest in said mortgages, were said A. L. Crampton, Mrs. Ellen B. Buck, wife of the Hon A. E. Buck, and your respondent." How Wm. F. Stoutz could be one of "the original, real parties in interest in said mortgages," on which the fifteen thousand dollars was raised; how part of that \$15,000.00 should be used in the payment of the older mortgage debt to him of \$4,500.00, and yet with that \$4,500.00 so received, he should purchase his *original* one-third interest in the mortgages on which the money was raised, are questions more easily asked than answered. We feel bound to hold that as to Wm. Stoutz, this is a mere evasion of the statute against usury, by an attempted purgation of the older, tainted contract, while the real transaction was a renewal of the debt, with a change of the security.

The result of the foregoing principles is, that the decree of the chancellor, so far as its affects Primo and Mrs. Buck, must be affirmed. So far as it affects Wm. F. Stoutz, it is reversed, only as to the amount due him on the mortgage debts. The true amount to which he is entitled, is the sum or sums of money lent by him to Mrs. Eslava, with lawful interest thereon, until the making of the sale. If in the making of the loan of \$1,500.00, he advanced any money beyond the old debt due him, he is entitled to that with interest. A decree is here rendered according to these principles, and the register is directed to take and report an account to the chancery court, based on these principles. The question of the confirmation of the report, and of the disposition of the surplus purchase-money, should any be found, are left open for the chancellor. We also leave open for the chancellor's consideration, the question of declaring a lien on the interest of said Stoutz in said lands, so purchased in his decree, for any balance of purchase-money found due from him. The costs of appeal to be paid by Wm. F. Stoutz.

[Jones v. Morris.]

Jones v. Morris*Real Action for Recovery of Lands.*

1. *Grantee, what sufficient description of.*—The grantee in a deed must be so described that he can be certainly known; but a deed to the heirs of a named deceased person is sufficient and will pass the legal title; for the persons who are to take, can be identified by extrinsic testimony.

2. *Code, section 2948 of; construed.*—The purpose and scope of section 2948 of the Code, are to dispense with a seal as an essential element of a legal conveyance of lands, and to leave the sufficiency of every written instrument for that purpose, when executed in the prescribed mode, dependent on the intention of the grantor to be collected from the terms of the whole instrument; it was not the intention of the statute to blot out all the common law principles, which, for the security of the titles to real estate, required greater solemnity in the execution of such conveyances, than in the case of mere simple contracts not under seal.

3. *Same.*—Though a seal is not now essential to a conveyance of the legal estate in lands, the conveyance retains all the operation and effect of a sealed deed at common law, and the estoppel arising at common law out of the recitals or covenants of a sealed instrument, still attaches to the unsealed conveyance, executed according to the requirements of the statute.

4. *Same; effect of, as to deed by agent.*—The statute has not changed the common law rule, that a deed executed by an agent, to be valid and binding upon the principal, must, with certainty, appear to be the deed of the principal, and must be made and executed in his name; and since the statute, as at common law, a deed by a agent, which grants and covenants in the name of the agent alone, is not at law a valid execution of the power, and will not pass the legal title; though equities may arise thereby which a court of equity will protect.

5. *Will, construed.*—Testator died seized of certain lands, leaving two sons legatees and devisees under the will, which was duly probated. The will devised and bequeathed to each of the sons, John and James, one-half of the estate real and personal, for the term of their natural lives, with provision that if either died before arriving at age, or without lawful issue, the estate should go to the surviving brother. The will further provided, that the portion of the estate which shall be allotted to John, should "be sold by his guardian according to law, (the will not nominating any,) and the funds placed at interest." The executors named in the will, qualified, and they were appointed guardians of John, by the Probate Court. The executors under order of the Probate Court, purchased lands of one Broxon, pursuant to a parol contract made by the testator, taking title to the heirs as such. John, afterwards died intestate of full age, without lawful issue. The guardians, without order of any court, sold all the right, title and interest of John in all the lands,—*held* :

1. The will did not authorize the guardians to sell the interest or share of John in the Broxon lands.

2. Their sale of John's interest in the lands devised was also void—the will contemplating a sale only after division, and then under order of a court of probate or equity.

APPEAL from Butler Circuit Court.

Tried before Hon. JOHN K. HENRY.

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This was a real action for the recovery of a tract of land containing nine hundred and twenty-one acres, in which the appellant was the plaintiff. The plaintiff claimed title as a devisee under the will of his father, Joseph Jones, deceased, and as the sole heir of his deceased brother, John E. Jones. The said will contained the following devises and provisions, which are its only parts now material: "Twelfth. I will and devise that my two sons shall inherit my estate in equal parts, (with the exception of the gold watch and chain given to my son John E.,) in the following manner and restriction which I now provide, to-wit: I will and bequeath to my beloved son, James A. Jones, one-half of my whole estate, both real and personal, of whatever kind or description the same may be, to have and to hold the same for and during the term of his natural life, and at his death the same is to descend to his lawful issue. In case he should die without issue, to his brother, John E. Jones. And I will and bequeath to my beloved son, John E. Jones, one-half of my whole estate, both real and personal, of whatsoever kind or description the same be, to have and to hold the same for and during the term of his natural life, and at his death the same is to descend to his lawful issue. In case he should die without issue, to his brother James A. Jones." The eleventh clause is as follows: "It is my will and desire, that should either of my children die before they arrive at age, or without lawful issue, then the survivor to inherit my whole estate." The tenth clause is: "It is my will and desire that the share or part of my estate which shall be allotted to my son, John E. Jones, shall be sold by his guardian according to law, and that the same be reduced to money, and that the funds be placed at interest." William F. Hartley and Edward Bowen were appointed executors of the will, but no guardian was appointed by the will for John E. Jones. Hartley and Bowen qualified as executors, and were, by the court of probate, appointed guardians of said John E. As executors, under a decree of the court of probate, in pursuance of a parol contract made by the testator in his life, they purchased and paid for with moneys in their hands, four hundred and twenty-five acres of the lands in controversy, taking the conveyance to the heirs of *Dr. Joseph Jones, deceased*, not otherwise naming or describing them. On the 2d September, 1859, the appellant, by an instrument under seal, duly acknowledged, appointed said Hartley and Bowen his attorneys, "to enter into, and take possession of all the real estate belonging to me, situated in the county of

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Butler, and State of Alabama, and to bargain, sell, grant, convey, and confirm the whole, or any part thereof, for such price or sum of money, or on such terms, as they may think best, and for me and in my name, to make, execute and acknowledge, and deliver unto the purchaser or purchasers thereof, good and sufficient conveyances with, warranty of the same," &c. On the 14th November, 1859, the said Bowen & Hartley, as the attorneys of the appellant, and as guardians of said John E., then a minor, but without the order or decree of any court, authorizing them as guardians to make such sale, sold at public outcry after notice for thirty days by advertisement in a newspaper published in Butler county, the lands to James W. Kimbrough, for the sum of nineteen thousand five hundred and eighty dollars, and subsequently executed to him a conveyance. The sale was on a credit until the first day of January, 1861. The conveyance was executed on the 17th day of August, 1863, and recites that Hartley and Bowen were guardians of said John E., and attorneys in fact of the appellant, the sale aforesaid, and the payment of the purchase-money by Kimbrough, and after describing the lands, proceeds: "We, W. F. Hartley and Edward Bowen, guardians for John E. Jones, and attorneys in fact for James A. Jones, have this day for and in consideration of the said sum of nineteen thousand five hundred and eighty dollars, have this day bargained, sold and conveyed, and by these presents do bargain, sell and convey unto the said James W. Kimbrough, his heirs and assigns, all the right, title, interest and claim, which the said Dr. Joseph Jones, deceased, had in and to said lands at the time of his death, and that the parties above named, to-wit: James A. and John E. Jones had, or has, in or to said lands, as the legal heirs and legatees of said Joseph Jones, deceased, and we, the said W. F. Hartley and Edward Bowen, guardians of John E. Jones, and attorneys in fact for James A. Jones, will warrant and defend, so far as we are authorized to do, this right and title of said lands unto said Jame W. Kimbrough, his heirs and assigns forever. In witness whereof, we have hereunto set our hands and seals on this, the 17th day of August, 1863.

(Signed)

W. F. HARTLEY, [seal]
EDWARD BOWEN, [seal]

Guardians of John E. Jones, and attorneys in fact of James A. Jones."

It was shown that Joseph Jones, the testator had a fee simple-title to all the said lands, except the tract bought by

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the executors from Broxon; that John E. Jones, died intestate, of full age, never having married, and without other heirs than the appellant. The appellee Morris, derived title from said Kimbrough. The evidence being undisputed, the Circuit Court charged the jury, the appellant was not entitled to recover. To this charge, the appellant excepted, and it is now assigned as error.

WATTS & SONS, for appellants.

HERBERT & BUELL, *contra*.

BRICKELL, C. J.—Though it is not expressly stated as a fact, yet it seems to be assumed in the argument of the respective counsel, and is fairly to be inferred from the facts which are stated, that the testator had no other children, when his will was made, and at his death, than the appellant and his brother John E. It is an essential requisite of a deed valid and operative as a legal conveyance of lands, that the grantee should be named therein, or so described that he is capable of being distinguished from other persons. The maxim, *id certum est quod certum reddi potest*, will however be applied, and from a known relationship to others, the grantee may be described and distinguished. “A deed made to the *heirs-at-law* of a deceased person is good, because the persons who are to take can be ascertained by extrinsic testimony.”—*Shaw v. Loud*, 12 Mass. 447. And a deed made to a partnership by the style of the firm, is legal in itself, and may be aided by parol proof, showing the individuals composing the firm.—*Lindsay v. Hoke*, 21 Ala. 542. The conveyance from Broxon passed the legal estate to the appellant and his deceased brother, and they were seized in fee of the premises in controversy—of that part of which the testator was seized, under the devises of the will—and of the Broxon lands under the conveyance from him.

2. It is a general principle, more strictly applied to contracts, or conveyances, to the validity of which a seal is necessary, than to simple contracts, that to bind the principal, the contract of his agent, must be made in his (the principal's) name. The common law requires that a deed executed by an agent, to be valid and binding upon the principal, must with certainty appear to be the deed of the principal, must be made and executed in his name. The names of principal and agent must appear in the execution of the deed, and it must appear that the grant and seal are those of the

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principal. If the deed appears to be the deed of the attorney,—if he grants and seals, it is void at law, as to the principal.—*Carter v. Chaudron*, 21 Ala. 72; 3 Wash. Real Prop. 249. In respect to written contracts not under seal, the rule was not so rigidly applied, and as to this class of instruments, it is sufficient, “if the name of the principal appears in the instrument, and it is evident from the writing, as a whole, that the intention was that the principal, and not the agent, was the person to be bound, the principal alone will be bound, if the agent had the authority to make the agreement, although the instrument be signed in the agent’s name only.” *Roney v. Winter*, 37 Ala. 277; Story on Agency, § 160 a. It is admitted that the conveyance to Kimbrough, is not in terms, or in the mode of execution, binding on the appellant, and sufficient to pass his estate in the premises, if the common law principle is applied. It is the agents or attorneys who grant, and their seals, not that of the principal is affixed.—*Parmers v. Respass*, 5 Mon. 562.!

But it is insisted the common law rule is, by statute, changed as to the conveyances of lands, and that no other or greater solemnity is now essential to convey the legal estate in lands, so far as this particular matter is concerned, than is necessary to the validity of any simple contract in writing. The statute referred to, reads as follows: “A seal is not necessary to convey the legal title to land, to enable the grantee to sue at law. Any instrument in writing, signed by the grantor, or his agent having a written authority, is effectual to transfer the legal title to the grantee, if such was the intention of the grantor, to be collected from the entire instrument.”—Code of 1876, § 2948. The common law required more form and solemnity in the conveyance of lands, than in the transfer of chattels. The freehold could not pass, after conveyances by writing became the usual mode of transfer, unless the conveyance was under the seal of the grantor. A writing not under seal, would create equities, if founded on a valuable consideration, but of these courts of law could not take notice. The freehold was of greater dignity, than personal property, title to which could pass by mere words or by delivery. This principle of the common law was frequently recognized in this court, and instruments creating equities perfect in themselves, were declared insufficient to pass the legal estate, and therefore insufficient to support ejectment.—*Ansley v. Nolan*, 6 Port. 379; *Thrash v. Johnson*, ib. 458. The statute expressly dispenses with a seal as necessary to convey the legal title to enable the

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grantee to sue at law; and by its terms meets and obviates the insufficiency of the instruments, which in the cases referred to was fatal to a recovery in ejectment, compelling suits in the name of the grantor to recover lands held adversely, and compelling a resort to equity, if the grantor would not voluntarily, or if he were dead, and could not, by a legal conveyance perfect the title. If these were the only words of the statute, its only effect would probably be, to enable the grantee of lands by an instrument not under seal, to sue at law, as if the conveyance was under seal—not dispensing with a seal as an indispensable element of a legal conveyance for all purposes. There are other words, however, indicative of a larger legislative intention, rendering effectual any instrument in writing, to transfer the legal title to lands, if such was the intention of the grantor to be collected from the entire instrument. Former sections of the Code prescribe with particularity, the essentials of conveyances for the alienation of lands, and of these, are an attestation by witnesses, or an acknowledgment of execution by the grantor before a proper officer, not essentials at common law.—Code of 1876, §§ 2145–6. When these several statutes are construed in connection, as they must be, we can not doubt, it was intended to dispense with a seal as an element of a legal conveyance of lands, and to leave the sufficiency of every instrument in writing, for that purpose, which is executed in the prescribed mode, dependent on the intention of the grantor as it may be collected from the terms of the instrument.

The rigid rule of the common law as to the execution of sealed instruments by agents, was purely technical, as was the rule that an authority to execute a deed or other instrument under seal, must be of equal dignity and under seal. Yet, when instruments under seal, have been executed by agents not having authority under seal—if the instrument would have been valid without a seal, and could, within the scope of the power of the agent, have been executed as an unsealed instrument, it does not follow in law or justice that it should not operate at all. The rule of most general application in the construction of written instruments, is, that the instrument must, if possible, be so interpreted as to uphold it, *ut res magis valeat quam pereat*, and that such meaning shall be given to it as will carry out to the fullest extent the intention of the parties. Such instruments, though in sealing them, the agent has exceeded his power, are permitted to enure and operate as the simple contract, the agent

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had authority to make.—*Ledbetter v. Walker*, 31 Ala. 175; *Randall v. Van Vechten*, 19 Johns. 60; *Evans v. Wells*, 22 Wend. 325; *Lawrence v. Taylor*, 5 Hill, (N. Y.) 107; *Worrell v. Munn*, 1 Seld. 239; *Tapley v. Butterfield*, 1 Metc. 515; *Long v. Hartwell*, 34 N. J. 116; *Stowell v. Elred*, 39 Wisc. 614; *Dickerman v. Ashton*, 2 Minn. 538. It was not necessary to the validity of the conveyance of the lands, which the appellant had given to his agents full authority to sell and convey, that they should, either in his name or their own, have sealed the instrument of conveyance. All that was necessary was an instrument in writing signed at the foot, attested or acknowledged, clearly expressing an intention to execute the power, and by the execution to bind the principal, and a transfer or conveyance of the lands, or of the estate therein of the principal, by apt words.

It was not to the seal alone, the common law attached the dignity, which required that with greater certainty, the instrument should appear to be the act and deed of the principal. The real distinction was between acts done *in pais*, and more solemn acts or instruments.—*Clarke v. Courtney*, 5 Peters 351. Though a seal may not now be necessary, to a conveyance of a legal estate in lands, yet, the instrument, *the deed of conveyance*, which it must still be termed, though shorn of its dignity of a seal, retains all the operation and effect of a deed sealed at common law. Its covenants may be as comprehensive, and whatever they may be, are as obligatory, and its recitals are as incapable of being gainsayed, as if it were sealed with the greatest formality. The estoppel which a sealed instrument, or its covenants, created at common law, is now claimed by the appellee, shall be attached to the conveyance by the agents of the appellant. And we can not doubt that the estoppel which at common law grew out of the covenants, or the recitals of a sealed instrument, attach now to an unsealed conveyance of the legal estate in lands. The statute is not so broad in its sweep as to blot out the common law principles which give security to conveyances of real estate. It would be fearful, indeed, if this was the operation of the statute, and the freehold in lands was not invested with greater dignity, than the fleeting ownership of chattels. While the clause of the statute we are considering is indicative of a larger legislative intention, than merely the dispensing with a seal as an element of a conveyance of the legal estate in lands, the whole scope of that intention is, that the intention of the grantor, as it is collected from the instrument, shall be carried into

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effect. The Code, in many of its sections, parts and clauses, simply repeats and affirms the common law; and in this clause it is merely declaratory of the rule of universal application in the construction of written instruments, to which we have referred, that the intention of the parties shall be ascertained, and effect given to it, if possible. To avoid any supposition or construction, that this rule was infringed by dispensing with a seal, as an essential ingredient of the conveyance of the legal estate in lands, is the whole scope of this clause.

When the conveyance is executed by an agent, though it is sealed, and his authority is unsealed, it may enure and operate as if it were unsealed, and though its execution may not conform to the rigid rule of the common law, as to the execution of sealed instruments, it may be valid; it is still not an instrument or act *in pais*, as would be a mere simple contract. The operative words—the words of grant and conveyance, must clearly appear to be the words of the principal, and not the words of the agent, though he be described as agent. It must be the principal who by the agent grants and covenants, or recites facts, which by force of the recital, become incapable of contradiction. Such not being the terms of this conveyance, it was wholly inoperative as to the principal, the appellant, at law. It is not a valid execution of the power he conferred. Whether it created an equity depends on facts, of which the present record is silent; but if such facts existed, they are not available in a court of law. It is unnecessary to decide whether by its terms the conveyance is limited to a grant of the present estate of the appellant, and is incapable of operating on that which he acquired subsequently by descent from his brother, and as executory devisee under the will of his father. Not being his deed, it did not, and could not pass the present, or the estate subsequently acquired.

The only remaining question is, as to the effect of the sale by the guardians of John E. Jones.

3. Assuming the will of Dr. Jones conferred on the guardian or guardians of John E. Jones, who might, after his death, be appointed by the court, having jurisdiction, power to sell the share of his estate, which, on division, should be allotted to said John E., will not aid the sale and conveyance made by the guardians to Kimbrough. The power did not authorize a sale of the interest or share of John E. in the Broxon lands, acquired by the unauthorized purchase by the executors after the death of the testator. It was on the

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estate devised and bequeathed by the will, the power operated; and not on lands subsequently acquired in which the testator had no estate, legal or equitable, or in which he may merely have contemplated acquiring an interest. A sale of the estate of John E. in these lands, by the guardian, not under the decree of a court of equity, is simply void, passing no title to the purchaser. The sale of his share or interest in the lands devised was also void—it was not made in accordance with the terms of the will, and if that is to be construed as conferring a power of sale, this sale was not a valid execution of the power. It is well settled in regard to the time of the sale, as well as to all other specific, express directions, that a power of sale must be strictly complied with, however unessential such directions may seem. 4 Kent, 365; 1 Sugden on Powers, 250. The testator contemplated as is shown by other parts of the will, than that which directs a sale by the guardian of John E., that his estate should be divided between his two sons. A sale of his entire estate without a division, by the guardian in conjunction with the appellant, is not contemplated. It is a sale after division, of the share of John E., and its conversion into money which is contemplated and directed. A sale before division was unauthorized, and was not in conformity to the power. The sale was to be made by a guardian, in whose appointment the testator could have no agency, and in whom he could not consequently repose any special confidence. Therefore, it is directed that the sale must be made *according to law*. It could not be made *according to law*, under our statutes then existing, unless it was made by the authority of a decree of a court of equity, or of the court of probate. The guardian by virtue of his office, was without authority to sell the personal or real estate of the ward. The person who was to sell, being unknown to the testator, and it being impossible for him to anticipate on whom the relation of guardian would devolve, the direction that the sale should be made *according to law*, fairly construed, imports that a sale, in the mode of sales by guardians, with which the testator was familiar, and which had the sanction of a court, was the sale he contemplated—not a sale, resting in the discretion of a person unknown to him, without the sanction of a court. If the sale was under the decree of a court, greater security would be afforded the ward for its fairness, and that its proceeds would be preserved for his benefit. If it was intended, as is suggested by the counsel for the appellee, that by the direction the sale should be made *according to law*, only a

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public sale, upon the notice, prescribed for sales by guardians, was intended, the indiscretion, or imprudence, is imputed to the testator, of entrusting a power to an unknown person, that men often hesitate to commit to nearest relations, or the best known friends. The sale by the guardians, of the estate of John E., was invalid, and on his death, the estate he had in the Broxon lands descended to the appellant as his heir at law, and his estate in the other lands passed to appellant, under the executory devise in the will of the testator.

The result is, the charge given by the Circuit Court was erroneous, and the judgment must be reversed and the cause remanded.

The South & North Alabama Railroad Co. v. Chappell.

Case to Recover Damages for Personal Injuries, &c.

1. *Case; what counts are in.*—A count seeking recovery for personal injuries, occasioned by falling in a ditch dug by defendant in the public highway, and averring that the injury was suffered and caused by the gross negligence of defendant in cutting the ditch and leaving it exposed, without proper safeguards, &c., is in case; and so also, is a like count, which alleged a duty of defendant to furnish bridges, barricades, or other usual means, to protect the public from injury, which defendant failed to provide, and that plaintiff suffered the injury by reason of the gross negligence of defendant, in cutting the ditch and leaving it exposed, without using proper precautions to guard the public, &c.

2. *Corporation; liability of, for torts.*—A corporation is civilly liable for torts, or for the acts and negligence of its servants or agents while in its employment, to the same extent and under the same circumstances as a natural person; the only limitation being, that it is not liable civilly or criminally for torts, of which malice is an essential ingredient.

3. *Same.*—It is not necessary to fix the liability, that the wrongful act or the negligence from which the injury proceeds, should have been committed while the corporation was in the exercise of powers conferred by the charter; it may have been committed while the corporation, or its servants acting under its authority, were exceeding corporate power, or engaged in transactions wholly foreign to its nature.

4. *Reputation of watchman when guarding ditch; when immaterial.*—In a suit against a corporation for personal injuries, caused by falling into a ditch dug by it in the public highway, its liability depends wholly on its having caused or continued the nuisance, and the plaintiff's suffering the injury without fault on his part; and hence evidence of the care used in selecting a watchman to warn persons approaching the ditch, or his general character or reputation as a watchman, at the time of his employment, are immaterial, and properly excluded.

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APPEAL from the Circuit Court of Montgomery.

Tried before Hon. JAMES Q. SMITH.

The appellee, James Chappell, brought this action against the appellant, the South and North Alabama Railroad Company, to recover damages for personal injuries received by falling into a ditch which appellant dug in the streets of Montgomery, and negligently left unguarded.

The complaint contained two counts. The first count averred in substance that appellant, a domestic corporation, caused a ditch to be dug in the public highway, to-wit, at the intersection of Commerce and Tallapoosa streets, in the city of Montgomery, and appellee, in ignorance of the existence of the ditch, and while in the pursuit of his legitimate business, about daybreak in the morning, fell into said ditch with his wagon and team, receiving various injuries, to his damage, &c., without fault on his part, and that "said injury was suffered in consequence and by reason of the gross negligence of defendant in cutting said ditch and leaving the same open, without barricades or other proper means of guarding the public from accidental injury by the same, and the cause of which injury might have been avoided, but for want of care on part of defendant."

The second count differed from the first, only in that it averred that "it was the duty of defendant to have bridges across the ditch, or to have the same barricaded, or to have used such other means as were usual and proper to guard the public passing said streets, during the day or night, from falling into said ditch or receiving injury therefrom; that plaintiff suffered the injuries because of the gross negligence of defendant in cutting said ditch and leaving the same exposed at night, without having used the means necessary and proper to guard the public from injury, which, but for want of due care on the part of defendant, would have been avoided," &c.

The defendant demurred, on the following, among other grounds: 1st, misjoinder of causes of action, one count being in trespass and the other in case; 2d, it is not shown that said ditch was dug by defendant in the prosecution of any business or act which its charter authorized, or in furtherance, or under authority, of any corporate power conferred by the charter; 3d, the facts set forth show no cause of action against defendant, and no duty or authority of defendant in respect to digging a ditch or leaving it open in said street.

The demurrer was overruled.

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On the trial, as the bill of exceptions states, there was conflicting evidence as to the precautions taken to protect the public from injury by said ditch. The evidence for the plaintiff tended to show that defendant was grossly negligent in this respect; while that of the defendant tended to show it had used due care and taken all proper precautions. "Among other evidence, plaintiff introduced evidence tending to show that the watchman employed to guard said ditch, and who had been left in charge of it the night before the accident, which happened about daylight, failed to remain by the ditch, until it was light enough for persons driving on the street to see the ditch. After this, defendant offered to prove that before and at the time said watchman was employed to guard said ditch, his general reputation as a watchman was that of a careful and competent watchman. On objection of the plaintiff the court would not allow this proof to be made, and the defendant excepted. This was all the evidence material to the questions raised by the foregoing exception. Afterwards defendant introduced evidence, without objection on the part of plaintiff, that said watchman was in fact a competent and careful watchman."

There was judgment and verdict for plaintiff, and defendant appeals. The ruling upon demurrer and the refusal to allow proof as to the general reputation of the watchman, are now assigned as error.

RICE, JONES & WILEY, for appellant.

ARRINGTON & GRAHAM, *contra*.

BRICKELL, C. J.—1. There is no misjoinder of counts in the complaint. Each count is in case, for the recovery of damages or injuries to the person and property of the plaintiff, suffered from a public nuisance created and continued by the defendant on one of the public streets of the city of Montgomery.

2. Whatever may have been the ancient doctrine, it is now settled that a corporation is civilly liable to the same extent and under the same circumstances as a natural person, for its torts, or for the acts and negligence of its servants or agents, while in its employment. The limitation of the principle, as announced in *Owsley v. M. & W. P. R. R. Co.*, 37 Ala. 560, is that as the corporation is incapable of malice, it is not liable civilly or criminally for torts, of which malice is an essential element. It is not necessary to fix the

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liability that the wrongful act, or the negligence, from which the injury proceeds, should have been committed while the corporation was in the exercise of the powers conferred by its charter. It may have been committed while the corporation, or its servants or agents acting under its authority, were exceeding corporate power, or engaged in business or transactions wholly foreign to its nature.—*P. M. & B. R. R. Co. v. Quigley*, 21 How. 202; 2 Wait's Actions and Defenses, 337; Greene's Brice's Ultra Vires, 240. It results, the demurrers to the complaint were properly overruled.

3. It was not material whether the appellant had or had not used due care in the selection of a watchman to give warning to persons approaching the ditch to avoid it, and the general character or reputation of the watchman employed was not involved. The liability of the defendant depended wholly on the fact whether it had caused and continued the nuisance, and the plaintiff had without fault on his part suffered injury from it. The concurrence of these facts rendered the defendant liable, whatever may have been the reputation, (or however well deserved,) of the watchman.

Let the judgment be affirmed.

Flinn v. Barber *et al.*

Bill in Equity to enforce Vendor's Lien.

1. *Vendor's lien; what not bar to enforcement of.*—In the absence of any agreement to the contrary, the vendor retains a lien on lands for the unpaid purchase-money, though he has made an absolute conveyance in fee to the vendee, and put him in possession; and the fact that the debt, as a mere legal demand, is barred by the statute of limitations, is no bar to the enforcement of the lien in equity.

2. *Same.*—Whether or not an administrator, who became a creditor of decedent in his life-time, need or can present a claim against the estate, is not decided; but the failure of a vendor of land, who afterwards becomes administrator of the vendee, to bring the debt for the purchase-money into the administration account, or to file or present the same as a claim against the estate, will not bar his right to enforce his vendor's lien in equity.—*MANNING, J.*, dissenting.

APPEAL from Chancery Court of Montgomery.

Heard before Hon. H. AUSTILL.

The appellant, Bunberry Flinn, filed this bill, on the 29th day of March, 1876, against Mrs. M. L. Barber, John G.

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Barber, and Josephine Flinn, to enforce a vendor's lien for the unpaid purchase-money. Mrs. Barber, before her marriage with her present husband, had been married to Watson Flinn, a son of appellant, and Josephine was a child of her first marriage.

The case made by the pleadings and proof was as follows: Appellant on the sixth day of October, 1865, sold the lands in question to his son, Watson, for the sum of \$3,200, and conveyed to him by warranty-deed in fee simple, the conveyance reciting full payment of the purchase-money. Watson Flinn immediately entered into possession, and so continued up to the time of his death. On the day of the execution of the deed to him, Watson Flinn executed his note to appellant for the purchase-money, payable one day after date.

Watson Flinn paid \$890 on said note, and died in September, 1867, leaving the balance due. After said Watson's death, and on the 28th day of September, 1867, appellant became his administrator, but the possession and control of the land remained in Mrs. Barber, up to the filing of the bill.

On the 21st day of July, 1869, appellant made an annual settlement of the estate of said Watson, by which it appeared that the estate was indebted to him in the sum of \$1,711. On the second day of December, 1869, appellant filed his accounts and vouchers for a final settlement. The account, as passed and allowed, showed that the receipts and disbursements exactly corresponded. In neither of these settlements was anything claimed by Bunberry Flinn on account of Watson Flinn's indebtedness for the land, and he had never received or been paid anything on account thereof, except the payment made by said Watson Flinn in his lifetime. The debt due for the land and the other debts made the estate largely insolvent, though it was not formally declared insolvent. The note of Watson Flinn was never brought in any way into the administration accounts, or filed in the Probate Court, or otherwise presented as a claim against the estate.

Some time after Watson Flinn's death, his widow, as the preponderance of the testimony shows, bargained with said Bunberry Flinn for the purchase of the lands, and her brother, John W. Hereford, paid \$1,000 for her on account of the purchase-money agreed on. Appellant claimed, however, that the payment was made on account of the original indebtedness of said Watson Flinn, deceased. The testimony shows that Mrs. Barber afterwards refused to com-

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plete the purchase, and recovered back the amount paid thereon.

The appellees set up, among other defenses, that the debt sought to be enforced, was barred by the statute of non-claims, and also by the statute of limitations of six years.

The chancellor was of opinion that as the note had not been presented or brought into the administration, or in any way filed against the estate, the debt evidenced by it was extinguished by operation of the statute of non-claim, and there was of consequence no debt in existence, to support the lien asserted; and he therefore dismissed the bill.

This decree is now assigned as error.

D. S. TROY, for appellant.

RICE, JONES & WILEY, *contra*.

STONE, J.—We think the weight of the testimony establishes the proposition that Mrs. Barber, then Flinn, paid the thousand dollars through her brother, Hereford, not in part payment of her deceased husband's purchase, but in part payment of an original purchase made by herself. We think the testimony also shows that the note of Watson Flinn, payable to Bunberry Flinn, his father, was given as the purchase-price of the land described in the bill. Long before the purchase by Mrs. M. Louisa Flinn, now Mrs. Barber, and in the life-time of Watson Flinn, her former husband, Bunberry Flinn sold and conveyed the lands to Watson Flinn, and thus divested himself of the legal title thereto. He retained only an equitable right to enforce the vendor's lien. Having only such equitable right, he could not sell and convey such a title to Mrs. Barber; and he had no power or authority to contract with her for a sale and conveyance of the land. The testimony informs us that Mrs. Barber has sued Bunberry Flinn for the thousand dollars thus paid him, and has recovered a judgment therefor. This leaves the purchase-money note, \$3,200, given by Watson Flinn, wholly unpaid, save the credit of eight hundred and ninety dollars. The bill, as at present framed, admits the payment on the note of the eight hundred and ninety dollars, and also of the one thousand dollars, paid by Mrs. Barber. Two defenses to this bill are relied on: First, that before the bill was filed, the note of \$3,200 was barred by the statute of limitations of six years. The ruling of this court has uniformly been that a vendor of lands, even though he makes a

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conveyance, has a lien thereon for unpaid purchase-money, unless there is something in the contract which repels the idea that a lien was intended to be retained. And that lien will be preserved, even against a sub-purchaser of the property with notice. It rests on the principle, handed down to us from the mother country, that it is unconscionable that one should purchase and hold the lands of another, without paying the purchase-price. And this lien, we have held, survives the bar of the debt, as a mere legal demand. This results necessarily from the fact that there is a lien.—*Relfe v. Relfe*, 34 Ala. 500, and numerous authorities cited; *Bankhead v. Owen*, 60 Ala. 457; *Bizzell v. Nix*, ib. 281.

We hold that the vendor's lien was not destroyed by the six years statutory bar of the debt.

The second defense relied on is, that the claim sued on was not presented to the administrator, or filed in the Probate Court, as a claim against the estate, within eighteen months after the grant of letters of administration. Bunberry Flinn, the payee, was the administrator of the estate, and the record shows that this claim was not brought into the administration. The estate was in fact insolvent, and the testimony tends to show that the entire assets were required to pay the debts of the estate that were brought in and allowed. It is thus shown that no part of this debt, other than the \$890, has been paid. Without intending in this case to decide whether an administrator need or can present a claim against the estate he represents, we are satisfied his failure to do so does not bar his equitable lien as a vendor.—*Locke v. Palmer*, 26 Ala. 312; *Inge v. Boardman*, 2 Ala. 331; *Duwall v. McLoskey*, 1 Ala. 738.

The decree of the chancellor is reversed, and the cause remanded, to be proceeded in according to the principles of this opinion.

MANNING, J., dissented, referring to his dissenting opinion in *Bizzell v. Nix*, 60 Ala. 284.

[Montgomery Gas Light Co. v. Merrick & Sons.]

Montgomery Gas Light Co. v. Merrick & Sons.

Appeal from Order refusing to stay Execution of Judgment against Garnishee, pending Plaintiff's appeal from Order dissolving Garnishment.

1. *Garnishee; how will be protected against double satisfaction.*—The garnishee being a mere stakeholder, standing in a relation of indifference between the plaintiff and defendant in the garnishment, will be protected against the jeopardy of double satisfaction, when sued by the defendant. The court states the mode in which this will be done.

2. *Supersedeas; when appeal will not operate.*—Under our statutes, an appeal will not suspend execution of the judgment or decree appealed from, unless bond and security be given for that purpose, as specified by the statutes.

3. *Same.*—When the garnishment is dissolved, the plaintiff therein can not, by merely taking an appeal, giving security for costs only, and notifying the garnishee thereof, suspend the effect of such order, or prevent the defendant from obtaining and enforcing judgment for his demand against the garnishee.

4. *Same; what does not require court to order stay of execution against garnishee.*—The pendency of such an appeal from a decree dissolving the garnishment, does not require another court, in which the defendant is suing the garnishee, to stay proceedings against him, for his protection against double satisfaction; payment of the judgment will protect the garnishee from further liability, though the order or decree dissolving the garnishment be afterwards reversed.

APPEAL from the Circuit Court of Montgomery.

Tried before Hon. JAMES Q. SMITH.

This was an appeal by the Montgomery Gas Light Company from an order refusing to stay execution on a judgment which Merrick & Sons obtained against it, in the said Circuit Court.

It appears from the bill of exceptions, that on the —— day of December, 1870, the appellant was garnished by Mrs. M. E. Winter, in a suit in the Chancery Court of Montgomery, against Merrick & Sons, to whom the Gas Light Company was indebted. The suit and garnishment were pending several years, and until the 29th day of November, 1878, when the bill was dismissed, and the garnishment issued under it, dissolved. On the same day, the chancellor made a decree, that if Mrs. Winter should give bond in a specified sum, within thirty days thereafter, the garnishment should remain in full force and effect. Merrick & Sons, before the expira-

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tion of said thirty days, recovered judgment in the Circuit Court, in a suit therein pending against said Gas Light Co., for a debt it owed them, and which had been withheld under the aforesaid garnishment. The amount of the debt from said Gas Light Company to Merrick & Sons, did not equal the amount which Mrs. Winter claimed of them. On the trial, the Gas Light Company set up the aforesaid chancery proceedings; but the court nevertheless rendered an unconditional judgment against it in favor of Merrick & Sons. Mrs. Winter never gave the bond required by the chancellor, but within the thirty days after the order was made, and after the judgment was rendered in the Circuit Court, took an appeal from the decree of the Chancery Court, giving bond for the costs of the appeal only. On the same day, she notified said Gas Light Company that the appeal had been taken, and that if it paid the judgment in favor of Merrick & Sons, it would do so at its peril. This was all the evidence. The court refused to grant a stay of execution or supersedeas, and the Gas Light Company excepted. This ruling is now assigned as error.

RICE & WILEY, and J. S. WINTER, for appellant.—A garnishee is a party *in invitum*. He is not in court by his own voluntary choice, but becomes a party by coercion of the court, at the instance of the plaintiff in the garnishment. He is clearly entitled to the benefit of the exercise of all the inherent power of the court, or of its presiding officer, to protect him against the peril of a double satisfaction of the same debt.—*Miller v. McLane*, 10 Ala. 210. It is not necessary to entitle the garnishee to protection, that the appeal of the garnishing creditor should be accompanied by a *supersedeas*. If the garnishing creditor, in a lawful mode, and within the time prescribed by law, takes an appeal from the decree or judgment, which temporarily dissolves his garnishment, and gives notice of such appeal to the garnishee before payment, and that he will be held liable if the appeal is successful,—then these facts entitle the garnishee to a stay of the proceeding until the appeal is decided.—*Drake on Attachments*, §§ 411, 412, and cases cited in notes; *Crawford v. Clute*, 7 Ala. 157; *Crawford v. Slade*, 9 Ala. 887.

W. A. GUNTER, *contra*.—The appellees have a legal right to the legitimate fruits of their judgment. If the garnishing creditor had wished to continue the garnishment in force, the decree of the chancellor, fixing the amount and prescrib-

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ing the effect of the bond to be given for such purpose, showed the manner in which this result could be obtained. The debtor who pays his obligation to his creditor, after a judgment has been obtained against him for it, is in no peril of being forced to pay it again; the judgment furnishes him ample authority for the payment, and complete protection from the consequences of such payment. If Mrs. Winter had superseded the decree of the chancellor, dismissing her bill and dissolving her garnishment, then the appellant could ask with some show of fairness for the relief they seek. Then it would be in danger of having to pay twice, a demand which it only owes once, and it would then be entitled to the protection of the court. If the attaching creditor is not willing to hold the property, by the execution of a *supersedeas* bond, it is his fault, and he loses his lien on the property. He can not obtain the advantages of a *supersedeas*, and relieve himself of the burdens of the requisite bond, by a mere appeal, and a notice to the garnishee.

BRICKELL, C. J.—The purpose of a garnishment is the appropriation of the debt owing by the garnishee, or the effects in his custody, to the satisfaction of the demand of the plaintiff against the defendant in the suit. After service of the garnishment, the garnishee stands in the relation of a stakeholder, and is supposed to be indifferent as between the plaintiff and the defendant. From all personal liability, and from all peril of future controversy, he may protect himself by payment into court of the debt he may owe, or by the delivery of such property in his hands, as may be subject to the garnishment.—Drake on Attach. § 661. Standing in this relation of indifference between the plaintiff and the defendant, the court will protect him against the jeopardy of a double satisfaction, if he is sued by the defendant. When the suits are pending in the same court, there can be but little difficulty in so moulding the judgments, that full protection will be afforded him, and at the same time preserving the rights of the plaintiff and the defendant. And when, as in the present case, the suits are pending in different courts, the court in which the defendant is suing the garnishee, will, on a proper application, stay proceedings until the garnishment is determined, or render judgment with a stay of execution, which can be subsequently removed, or rendered perpetual, in whole or in part, as justice may require.—*Crawford v. Slade*, 9 Ala. 887. Or, if the defendant has obtained judgment, and a garnishment subsequently issues, execution

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on the judgment will be stayed, on the giving by the garnishee of sufficient security to protect the defendant from loss, if judgment is not obtained on the garnishment.—*Skipper v. Foster*, 29 Ala. 330. A payment by the garnishee of a judgment rendered against him, protects him, though the judgment is irregular, and is subsequently reversed for irregularity.—*Duncan v. Ware*, 5 Stew. & Port. 119; *Gunn v. Howell*, 35 Ala. 144. He may satisfy such judgment, without waiting until he is coerced by execution.—*Mills v. Stewart*, 12 Ala. 90. The judgment is conclusive, as between the garnishee and the defendant, unless the defendant appeals, of which the garnishee has notice. And the appeal does not prevent the garnishee from satisfying it, unless the judgment is superseded by bond.—Code of 1876, § 3316.

In the present case, the garnishment was dissolved, the bill of the complainant was dismissed, and it was ordered, that if the complainant within thirty days appealed from the decree, the garnishment should be restored, if she executed a *supersedeas bond* in the sum of one thousand dollars, payable, and with condition as prescribed by the statute, (Code of 1876, § 3928.) Within thirty days, without executing the bond, the complainant merely giving security for costs, sued out an appeal to this court, which is yet pending and undetermined, giving the garnishee notice of the appeal. The garnishee thereupon applied to the judge of the Circuit Court, in which his creditor had obtained judgment against him, to stay proceedings on the judgment, until the termination of the appeal. The stay was refused, and from the judgment this appeal is taken.

The authorities relied on, to support the right to a stay of the proceedings, are those to which reference has been made; but they stand on different grounds, and proceed on reasoning which has no just application to this case. The statutes have very carefully regulated the mode of prosecuting appeals, and have very clearly defined their effect, and the rights of parties during their pendency. An appeal can not be taken, unless the appellant give security for the costs, and the names of the sureties are certified to this court; and the certificate is part of the record, authorizing the issue of execution against the sureties for costs, if the appellant is unsuccessful.—Code of 1876, § 3950. Such an appeal does not operate to stay the execution of the judgment or decree, from which it is taken. If a suspension of execution is sought, a bond with sufficient securities must be executed by the appellant or some person for him. When the judgment or de-

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cree, is for the payment of a fixed sum of money, the statute prescribes as the penalty of the bond, double the amount of the judgment, and as its condition, the prosecution of the appeal to effect, and the satisfaction of such judgment as this court may render in the premises.—Code of 1876, § 3927. If the judgment or decree is not for the payment of money, and its suspension pending an appeal is sought, the chancellor, or register, or judge of the court, in which it was rendered, may fix the amount and penalty of the bond, which is to operate as a suspension, or *supersedeas* of the judgment or decree.—Code of 1876, § 3928. In either case, a bond with sufficient security, to protect the party temporarily deprived of the right of enforcing the judgment or decree, from all damage by reason of the suspension of execution, is a condition precedent, the statutes clearly prescribe. At common law, a writ of error, (and an appeal under the statute is a substitute for the common law writ of error,) was a *supersedeas* of execution from the time of its allowance. The court issuing it would, if it was not apparent the writ was sued out merely for delay, stay any proceeding on the judgment, during its pendency.—1 Tidd. Pr. 530. The plain purpose of the statutes, is a change of this rule of the common law; depriving the appeal of the inherent capacity to supersede the execution of the judgment or decree. That capacity does not now attach to the appeal—a bond with sufficient surety, is indispensable to stay execution. It is the condition on which the proceedings may be stayed pending an appeal, prescribed by the statute, and courts have no power to dispense with its performance, or to substitute any other terms in place of it.—*Hogan v. Ross*, 11 How. 294.

Nor is there the necessity for a stay of proceedings, to protect the garnishee from being made liable to his creditor, and to the plaintiff in the garnishment, which exists, when the garnishment is sued out prior or subsequent to the suit or judgment of his creditor. The judgment or decree dissolving the garnishment, is subsisting, of full force, and the creditor is entitled to enforce the collection of the debt. If the garnishee pays voluntarily, or under legal process issuing on a judgment obtained against him by his creditor, he has the protection of a valid judgment discharging him from liability to the plaintiff in the garnishment. The subsequent reversal of that judgment, whatever claim for restitution the plaintiff in the garnishment may acquire thereby against the defendant, can not retroact, so as to restore the liability of the garnishee to him. The case of *Sherrod v. Davis*, 17 Ala.

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312, is not in conflict with this view. The court is there speaking of a judgment *suspended by a writ of error or appeal*, and not of a judgment, which a pending writ of error or appeal does not suspend, and which the statute in effect declares shall not operate a suspension. The judgment of the circuit judge is affirmed.

McArthur v. Dane.

Appeal from Order Quashing Execution.

1. *Case explained.*—When this case was here at a former term (see *Dane v. McArthur*, 57 Ala. 448), on appeal from a judgment against Dane and his sureties, this court was compelled to correct a clerical error, and to amend the judgment so as to operate against Dane alone; and having to correct this error before the judgment could be affirmed, could not, and did not, award damages on affirmance; the judgment of the Circuit Court against Dane was not disturbed, nor was it decided that its judgment for damages was erroneous.

2. *Affirmed judgment; can not be corrected or altered by lower court.*—A judgment of the lower court affirmed on appeal, is merged in the judgment of this court, and can not be altered by the lower court; nor by this court, after the expiration of the term at which it was rendered.

3. *Damages against sheriff for failure to pay over money; what motion sufficient to support judgment for.*—The statute prescribes the damages recoverable of a sheriff in a summary proceeding for failure to pay over money collected on execution; and if the motion sets forth the facts with sufficient certainty, it is in effect a motion for the damages also, and will support a judgment awarding them.

4. *Receipt; when will not amount to satisfaction.*—A receipt in full, on payment of a less sum than was actually due by the sheriff, on a judgment against him and his sureties, for his failure to pay over money collected on execution, will not prevent the issue of execution afterwards to collect the statutory damages, where the plaintiff in the judgment was ignorant of his right to any damages, at the time the receipt was given; in that event, the receipt will only operate as satisfaction *pro tanto*.

APPEAL from Circuit Court of Mobile.

Tried before Hon. H. T. TOULMIN.

This is an appeal by McArthur from an order of the Circuit Court quashing an execution in his favor against Dane.

It appears from the record that on the eighth day of March, 1875, McArthur recovered a judgment in an attachment suit against one Blodgett in the Circuit Court, for the sum of \$344.62 costs. Execution was placed in the hands of Dane, who was then sheriff, but he erroneously applied the proceeds of the sale of the property levied on, to the satisfaction of other executions in his hands.

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On the ninth of April, 1875, McArthur gave notice of a motion for a summary judgment against Dane and his sureties for failure to pay over the money. The notice was of a motion for judgment against the defendants for the amount of the Blodgett judgment and interest from date of its rendition. The Circuit Court, on the 19th day of June, 1875, rendered judgment against Dane and his sureties for the amount of the judgment, with damages at the rate of five per cent. a month from the date of the rendition of the Blodgett judgment, and for costs.

On Dane's appeal to this court, this judgment was amended "so as to show that it was rendered against Dane alone, and as thus amended is affirmed in all things as to said Rufus Dane." It was [further considered that the sureties upon Dane's appeal-bond pay the costs of said appeal, in said Supreme Court, and in the Circuit Court.—See *Dane v. McArthur*, 57 Ala. 448. This judgment was duly certified to said Circuit Court.

Afterwards, on November 10th, 1877, the clerk issued an execution on this amended judgment, which commanded the sheriff "that of the goods, lands and tenements of Rufus Dane, you cause to be made the sum of three hundred and sixty-eight dollars, with damages thereon at the rate of five per cent. a month, since the 10th of April, 1875, which John McArthur recovered of him, by judgment of our Circuit Court," beside costs.

Dane, thereupon, moved to quash the execution, and for a *supersedeas* thereof, and in support of his motion, offered a receipt of John McArthur, which reads as follows:

"Received, Mobile, August 29th, 1877, from Rufus Dane, late sheriff of Mobile county, four hundred and seventy dollars and three cents, being in full for judgment, interest and damages in the case of John McArthur against Rufus Dane, late sheriff of said county, and his sureties on his official bond, upon a judgment rendered against them on the 19th day of June, 1875, in the Circuit Court of Mobile—also received costs refunded me in the case of myself against John Blodgett, from the said Circuit Court of said county. The costs in the case of *John McArthur v. Rufus Dane* and his sureties are all to be paid by said Dane or his said sureties.

"JOHN MCARTHUR.

"Witness: JEROME ESLAVA."

The execution of this receipt and the circumstances under which it was obtained, were shown by affidavits of Eslava and Dane, which in some respects conflicted with that of

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McArthur. It appears, however, that McArthur was ignorant at the time he gave the receipt and until some time afterwards, until his counsel informed him, that he was entitled to the five per cent. damages. The court quashed the execution, and McArthur excepted. This ruling is now assigned as error.

MCKINSTRY & SON, for appellant.—The alleged irregularities in the original notice of motion, and in the judgment affirmed by this court, are not available on the present appeal. The term at which that judgment was rendered has expired, and the Circuit Court had no power to correct or question that judgment.—20 Ala. 373; 44 Ala. 361; 1 Brick. Dig. p. 106.

The receipt of McArthur was obtained from him when he was in ignorance of his rights, and therefore does not conclude him.—2 Porter, 526; 5 Ala. 430; 21 Ala. 750; 11 Allen, 112; 44 Mo. 444; 39 Ga. 605; 1 Johns. Ch. 141; 2 Verm. 210.

OVERALL & BESTOR, *contra*.—The *original motion and notice* in this case, served on Dane, and on which the case was tried, contained no claim for damages. It is a motion for a specific amount of money, and that full amount with the legal interest upon it, has been paid to John McArthur.

The judgment went beyond the notice and claim, and is for an uncertain amount. A judgment for a specific amount with the addition of five per cent. a month damages on said amount, is void for uncertainty. A notice against a sheriff for failing to pay over money, &c., must show that the party intends proceeding for *damages* as well as the amount collected and interest, otherwise the former are not recoverable. *Barton v. Lockart*, 2 Stew. & Port. 109; *Brazeal v. Smith*, 5 Ala. 206. A judgment should show the specific amount of money recovered. Without this requisite, it is no judgment. *Minor*, 185; 16 Ala. 828. The specific amount of money recovered, as shown by the judgment has been paid. The judgment has been satisfied, and this execution should be superseded or quashed.—3 Ala. 653; 17 Ala. 339; 20 Ala. 399–420.

When this case was before this court, at the December term, 1877, the judgment for the amount of money collected by Dane and improperly paid over to Vass & Co., is affirmed in favor of McArthur, but expressly “*without damages*.”—See opinion in that case.

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A judgment can only extend to the matters put in issue by the pleadings, and as no damages of five per cent. a month were claimed in the notice, none could legally be incorporated in the judgment.—Freeman on Judgments, §§ 257, 258.

STONE, J.—When the case of *Dane v. McArthur* was in this court at a former term, we corrected a clerical error in the judgment-entry, and affirmed the judgment against Rufus Dane. But inasmuch as the clerical error had to be corrected, and was corrected in this court, before the judgment could be affirmed, the result was that no damages were, or could be awarded by this court on the affirmance. Hence we said, in the opinion in that case, “affirmed, but without damages adjudged on affirmance in this court.”—*Dane v. McArthur*, 57 Ala. 448; Code of 1876, § 3946; 1 Brick. Dig. 81, § 178, *et seq.* In the language copied, we neither said, nor intended to say that the judgment for damages in the Circuit Court was reversed or disturbed. The result of our decision was to affirm in all respects the decision of the Circuit Court against Mr. Dane, and to reverse and annul it as against his sureties. The affirmance here rendered merged the judgment of the Circuit Court in ours, authorized execution to be issued from that court for the collection of the judgment as there rendered against Dane, and placed it out of the power of the Circuit Court to alter or change that judgment in any respect.—*Norris, Stodder & Co. v. Cottrell*, 20 Ala. 304; *Wiswall v. Monroe*, 4 Ala. 19; *Stephens v. Norris*, 15 Ala. 79.

The present proceedings originated on a motion to quash the execution issued on the affirmed judgment against Rufus Dane. Two reasons are urged why we should affirm the judgment quashing the execution. First, the settlement made by Dane with McArthur, and the receipt in full given by the latter. We concur in opinion with the circuit judge that when this receipt was given, McArthur did not know, and was not informed by any one, that he was entitled to five per cent. a month on the amount of money held by Dane, the sheriff. If he had been so informed, and had then received a less sum in full payment of the amount due, such receipt and discharge would, under our statute, have operated a full payment and acquittance of the judgment. Code of 1876, §§ 3039, 3040. Such, however, is not the present case. We think the receipt can only operate as a partial payment. The second reason urged for an affirmance of this judgment is, that the motion against the sheriff did not give

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him notice that the statutory damages would be claimed against him, and hence, the judgment for damages is not supported by the pleadings. It is perhaps a sufficient answer to this to say, that the original judgment of *McArthur v. Dane* is not before us on this appeal, and hence, we can not consider the regularity of that judgment. That judgment was affirmed in this court, and was thus, as we have seen, placed beyond the modifying power of the Circuit Court. On this appeal, it is even beyond our modifying power. But we do not think the motion insufficient. Damages, in such case, are given by statute; and when the motion was made for judgment against the sheriff for not paying over the money on demand, this was, in effect, a motion for such judgment as the statute in such cases authorizes. Code of 1876, §§ 3284, 3356, 3357.

The judgment of the Circuit Court, quashing the execution is reversed, and *procedendo* awarded to the Circuit Court.

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Real Action in Nature of Ejectment.

1. *Plea of tender; what insufficient.*—Where the purchaser of lands conveyed under the mortgage sale, brings ejectment against the mortgagor, the latter's plea that, before suit was brought, and within the time prescribed by statute, he tendered the amount required to redeem,—the plea not being accompanied by deposit with the clerk of the amount tendered—presents no defense to the action, and should be rejected, on motion.

2. *Case distinguished.*—The case of *Jonsen v. Nabring*, 50 Ala. 392, distinguished from this.

3. *Mortgage, defective execution of; what cures.*—Though a mortgage as originally executed is invalid, yet if the mortgagor subsequently executes a power of sale of the lands conveyed by the mortgage, accurately identifying it and the debt secured, and authorizing a sale for the purpose of paying such debt,—this cures the invalidity of the mortgage.

4. *Paper title; what dispenses with proof of.*—A mortgagor in possession, pleading in bar of ejectment, by one claiming under a purchaser at the mortgage sale, that after the sale he became tenant of the purchaser, and made him the proper statutory offer and tender for redemption, thereby admits of record that such purchaser then had title, and takes upon himself the onus of showing that he redeemed under the statute.

5. *Maintenance; what conveyance falls within the rule against.*—Where the mortgagor, after becoming tenant of the purchaser at the mortgage sale, renounces his tenancy, and thereafter claimed to hold in his own right, upon the purchaser's refusal of an offer and tender for redemption,—this is such an adverse holding as, under the rule against maintenance, will prevent a

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grantee from the purchaser, during such adverse possession, from recovering the premises, in an action of ejectment in his own name.

6. *Error; when not ground for reversal.*—Where the case is such that in no event can the plaintiff recover, erroneous rulings against him, furnish no ground for reversal.

APPEAL from Wilcox Circuit Court.

Tried before Hon. JOHN K. HENRY.

This was a real action in the nature of ejectment, brought by the appellants, J. D. Alexander, A. C. Davidson, F. M. McNeil, and J. T. Hollis, against the appellee, J. Decatur Caldwell, on the fifth day of February, 1878, to recover a tract of land, which appellee once owned, but which had been sold and conveyed to appellees under a power in a mortgage executed by Caldwell.

Defendant pleaded not guilty, and a special plea number two, which averred in substance, that said lands were on the 14th day of December, 1868, sold by said plaintiffs, as the assignees of Patrick, Irwin & Co., under a power of sale of said lands made by this defendant on the 24th day of September, 1868, authorizing and empowering said Patrick, Irwin & Co. to sell and convey the lands for payment of the debt secured; that a sale was had on the 14th day of December, 1868, "when the said lands were purchased by one Albert A. Smith, as the highest bidder, for the sum of three thousand dollars; that this defendant remained in possession of said lands after said sale as tenant of said Smith, and paid him rent therefor from the date of said sale to the 13th day of December, 1870, on which last mentioned day, and within two years after said sale, under said mortgage and power of sale, the defendant redeemed said lands by tendering on the 13th day of December, 1870, the said purchase-money with ten per cent. per annum thereon, and all other lawful charges, to said Albert A. Smith, the purchaser, as aforesaid; and defendant avers that by said tender as aforesaid by him, he was reinvested with the title to said lands. And said defendant suggests that he has for three years next before the commencement of this suit had adverse possession of said lands, and has made valuable and permanent improvements thereon, to the value of one thousand dollars."

The plaintiffs moved the court "to strike out said second plea, the same being a plea of tender, because it is not accompanied by the payment of the money into court." This motion was overruled. The plaintiffs then demurred to the plea, because: 1st, the plea does not state the amount tendered; 2d, the plea does not state that defendant produced

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any money or excuse the failure to produce it at the time of the tender and proposal to redeem; 3d, the plea is not accompanied by a delivery, of the money alleged to have been tendered, to the clerk of this court. This demurrer was overruled. The plaintiffs then replied, that on the 31st day of December, 1868, after the sale by plaintiffs, as assignees of Patrick, Irwin & Co., of the lands mentioned in the complaint, and before the expiration of two years from said sale, defendant filed his petition in bankruptcy in the United States District Court at Mobile, and that his right to redeem said lands was divested out of him by said petition. The defendant demurred to this replication, and his demurrer having been overruled, rejoined, in substance, that within two years after said sale, defendant's assignee in bankruptcy sold, at public outcry, defendant's equity of redemption, at which sale defendant became the purchaser, and said assignee, by instrument in writing duly executed, conveyed to defendant the equity of redemption and right to redeem, whereby defendant became invested with the right to redeem and had such right at the time of the tender. Plaintiffs demurred on the grounds: 1st, that the rejoinder did not show that defendant was a discharged bankrupt at the time of said purchase; 2d, because redemption can not be made under part 2, title 7, chap. 4 of Code, by the purchaser at the sale of an assignee in bankruptcy. This demurrer was overruled, and plaintiffs took issue on the rejoinder.

The plaintiffs then offered in evidence a certified copy, from the records of the Probate Court, of a mortgage executed by defendant to Patrick, Irwin & Co., on the 5th day of November, 1860, conveying the lands in controversy, to secure a debt therein mentioned. The mortgage contained no power of sale, and its execution was not attested by any witness. It was acknowledged on the day of its date by Caldwell, before a justice of the peace, whose certificate was as follows:

"State of Alabama, Wilcox county. I, George O. Miller, an acting justice of the peace in and for said county, personally came J. Decatur Caldwell, who is known to me, acknowledged before me that after being informed of the contents of this conveyance, assigned the same for the purposes therein specified, the day the same bears date. This 6th day of November, 1860. Geo. O. Miller, J. P."

This mortgage and certificate were duly recorded in the probate judge's office on the 8th day of December, 1860.

The defendant objected to the admission of the mortgage

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on the ground that it was not properly witnessed or acknowledged, and the court sustained the objection and excluded the mortgage, and plaintiffs excepted.

The plaintiffs then offered in evidence, a power of sale made by defendant to Patrick, Irwin & Co., on the 24th day of September, 1860. This instrument was under seal and witnessed, and after accurately describing the mortgage, the debt it was given to secure, and lands conveyed, &c., recites that there was no power of sale therein contained, and proceeds, "now, therefore, in consideration of the indulgence granted to me upon said mortgage by said Patrick, Irwin & Co., and in order to save trouble and expense of further legal proceedings, in order to close said mortgage and to effect a sale of said lands, under the same, I hereby consent that the said Patrick, Irwin & Co., or their assignees or legal representatives, may, and shall have full and complete legal authority to close said mortgage by the sale of said lands, conveyed in and by said mortgage, at public auction to the highest bidder for cash, in the town of Camden," &c.

The plaintiffs then offered in evidence the written transfer to them by Patrick, Irwin & Co., of Caldwell's mortgage to them, and also of the note which the mortgage was given to secure, "after the execution of said transfer was proved by one John D. Alexander." This transfer was made March 13th, 1868. The defendant "objected to said transfer of the mortgage being admitted in evidence, because it was the transfer of a void instrument." The court sustained the objection, and plaintiffs excepted.

The plaintiffs, after due proof of execution, offered in evidence a deed made by them, under a sale of the premises, in accordance with the power of sale, to Albert A. Smith; and a subsequent deed from said Smith to plaintiffs, of the premises in controversy. The first deed was executed April 7th, 1869, and the second deed on the 2d day of July, 1872.

There was evidence tending to prove the facts set up in defendant's second plea, and also that after the sale to Smith, Caldwell remained in possession, and within two years thereafter, tendered Smith thirty-seven hundred dollars in legal tender currency, being the amount of the purchase-money, with ten per cent. interest and all legal charges, but "Smith and plaintiffs refused to receive it or any part thereof," and defendant has since remained in possession, and has never paid the amount to either of them. There was also evidence of the sale by Bailey, assignee, to said Caldwell, as set forth in defendant's rejoinder to plaintiffs' replication to his second

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plea. Several exceptions were reserved to rulings upon these matters, which are not material in the view which this court took of the case.

The court charged the jury, among other things, that if Caldwell purchased the right of redemption at his assignee's sale, and received a conveyance thereof, and within two years after the mortgage sale tendered Smith and plaintiffs the amount of the purchase-money, ten per cent. per annum thereon, and all lawful charges, which they refused to accept, that this reinvested Caldwell with title to the lands, and plaintiffs could not recover in this action. Plaintiffs excepted to this charge, and separately requested the following written charges: "1st. That the acknowledgment of the mortgage by Caldwell before Miller, the justice of the peace, was a substantial compliance with the statute; 2d, the tender by Caldwell does not of itself invest him with such title as would defeat the plaintiffs in an action of ejectment, without first bringing the money so tendered into court; 3d, the defective acknowledgment of the mortgage before Miller, did not make the mortgage void."

The court refused these charges, and plaintiffs separately and duly excepted, and in consequence were compelled to take a non-suit, &c.

The rulings upon the pleadings, the exclusion of evidence, the charge given, and the refusals to charge as requested, are now assigned as error.

JONES & JONES, for appellant.—1. The appellants' title will support an action of ejectment.—*Hawkins v. Hudson*, 45 Ala. 482, and cases cited.

2. The appellants' title could only be defeated by defendant's superior title in writing. "In a court of law there can be no estoppel affecting the title to land which is not in writing, for at law the title can pass by writing only." *Kelly v. Hendricks*, 57 Ala.; *Farley v. Smith*, 39 Ala. 42.

3. The appellee sought under his second plea, to defeat the appellants' action of ejectment, by setting up, under section 2511 Rev. Code, that he had tendered to the purchaser at the mortgage sale the amount of the purchase-money, ten per cent. per annum thereon, and all other lawful charges, which plea was nothing but a plea of tender, (see *Jonsen v. Nabring*, 50 Ala. 392,) and the plea was not accompanied by a delivery of the money alleged to have been tendered to the clerk of the court, as required by section 2648 Rev. Code. In *Jonsen v. Nabring*, a similar plea was interposed by the

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defendant in an action of *unlawful detainer* before a justice of the peace, and this court held that "the statute which requires that a plea of tender must be accompanied by a delivery of the money to the clerk of the court, does not apply to actions commenced before a justice of the peace;" in effect saying that where such a plea was interposed in the Circuit Court, "a court having a clerk," the statute must be complied with.

4. Section 2511 Revised Code has never been construed so far as we are advised, by our Supreme Court. We respectfully submit, that while in order to perfect Caldwell's right of redemption, actual payment of the money was unnecessary, yet to reinvest him with the title, the money must have been actually paid to the appellants' vendor, or into court. We can see no distinction between the requirement that would be exacted of a judgment creditor who offered to redeem from a purchaser at sheriff's sale, and what the law would require of a mortgagor who offered to redeem from the purchaser the property sold under the mortgage. A judgment creditor, although he has a right to redeem, never acquires any title to the land, until he actually credits his judgment with an amount equal to the original bid for the land and ten per cent. per annum thereon, and all other lawful charges.—*Walker, Mead & Co. v. Ball*, 39 Ala. 298.

5. Caldwell's equity of redemption was cut off by the mortgage sale of the appellants.—*McGuire v. Van Pelt et al.*, 55 Ala. 344. He had no right to redeem, except that given him in section 2511 Rev. Code. Under the statute law, as soon as he tendered the money to Smith, he perfected his equitable right of redemption.—*Moore & Lynes v. Gore*, 35 Ala. 701. He could not be reinvested with the title to the lands without an actual payment.—See *Walker, Mead & Co. v. Ball*, 30 Ala. 298.

Caldwell's remedy, being in possession of the lands when the action of ejectment was brought, was to file a bill in chancery, and enjoin the action at law, and pay into court at the time of filing his bill the amount of money tendered by him, or averring his readiness to pay the money to perfect his title.—*Spoor v. Phillips*, 27 Ala. 193; *Cain v. Gimon*, 36 Ala. 168; *Daughdrill v. Sweeney*, 41 Ala. 410; *Nelson & Hatch v. Dunn*, 15 Ala. 501; *McGuire v. Van Pelt*, 55 Ala. 344; *Carlin v. Jones et al.*, 55 Ala. 424.

6. The demurrers of appellants to appellee's second plea should have been sustained.—Code, § 2997; 36 Ala. 698; 41 Ala. 310.

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7. The certificate of the justice of the peace to the mortgage of Caldwell to Patrick, Irwin & Co., was substantially in compliance with the statute. Besides, the appellee, in his second plea, admits the execution of the mortgage.

8. The court erred in not allowing the transfer of the note and mortgage by Patrick, Irwin & Co. to appellants to be offered in evidence. The transfer was in writing and its execution proven, and it should have gone to the jury, even if the certificate of acknowledgment to the mortgage had been substantially defective.

9. The third charge should certainly have been given if the second was given; and besides, Caldwell had no title to the land until he had paid the amount tendered. The fourth charge should have been given. This court has decided that even if the acknowledgment was defective, which we do not admit, that it would be equivalent to the attestation of one witness, and it would be competent to supply the deficiency by further proof of its due execution.—*Merritt et al. v. Phenix*, 48 Ala. 87.

10. The only way in which appellee sought to defeat the action of ejectment, was by his second plea; and being a plea of tender, (50 Ala. 392,) if Caldwell had never paid the money, he could not defend in this action, and for that reason, the appellee's charge should have been refused.

R. GAILLARD, and S. J. CUMMING, *contra*.—1. There was no error in overruling plaintiffs' motion to strike defendant's plea from the file. It was not a plea of tender under section 2997 of the Code, but a plea in bar of the action—ejectment—under section 2879 of the Code.—2 Brick. Dig. p. 396, § 24.

2. There was no error in overruling plaintiffs' demurrer to defendant's second plea. It was a sufficient plea under the Code.—Code of Ala. §§ 2987 and 2879; 2 Brick. Dig. p. 396, § 24.

3. There was no error in sustaining defendant's objection to allowing the mortgage, or instrument purporting to be a mortgage, given by Caldwell on the 5th of November, 1860, to Patrick, Irwin & Co., to go to the jury as evidence. Section 1266 of the Code of 1852 required the execution of all conveyances to be attested by at least one witness, and when the grantor could not write, by two. There was no witness who attested the execution of the said so-called mortgage.

The requirements of neither section 1266 nor section 1267, nor of section 1279 of the Code of 1852 were complied with, and the instrument was of no validity.

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What purports to have been an acknowledgment under said section 1279 was no acknowledgment. It certified nothing. The language, "assigned the same for the purposes then therein specified," is substantially different from the words prescribed in the form, to-wit, "he executed the same voluntarily." That it was a void instrument, see *Thompson v. Marshall*, 36 Ala. 504; *Hendon v. White*, 52 Ala. 597. We submit that *Merritt v. Phenix*, 48 Ala. 87, is not a correct exposition of the statutes. The acknowledgment or proof to supply the want of witnesses, must be made "according to law."—Code, §§ 2146, 2154; *O'Neal v. Robinson*, 45 Ala. 526; *Weil & Bro. v. Pope*, 53 Ala. 585; *Harrison v. Simons*, 55 Ala. 510. The certificate is neither in the form given in the Code, nor is it a substantial compliance therewith.

4. If the court committed no error in excluding the so-called mortgage on the ground that it was a void instrument, it follows, that the offer of the transfer of said instrument as evidence should be excluded.

5. The objection to Caldwell's testimony, because he had not paid the amount of money to the clerk, was based on the idea that the second plea was a plea of tender under section 2997 of the Code, and the overruling plaintiffs' objection was no error.

6. There was no error in the charge of the court. It was a correct statement of Caldwell's rights, and of the effect of his tender.—Bump's Law and Prac. of Bankruptcy, 325; 2 Brick. Dig. 396, § 24.

7. There was no error in refusing the charges asked by plaintiffs numbered 1, 3 and 4.—See Code of 1853, §§ 1266, 1267, 1279; Code of Ala. § 2879; 2 Brick. Dig. 396, § 24; *Hendon v. White*, 52 Ala. 597.

8. The action was in the nature of ejectment. The question of title could only be settled. If Caldwell's title had been defective, he could not have made it good, had he tendered a million of dollars into court. There was, therefore, no error in the charge asked by the defendant and given by the court.

STONE, J.—The plaintiffs in the present action assert title as follows: That on the 6th day of November, 1860, defendant executed his mortgage to Patrick, Irwin & Co., conveying to them the lands in controversy, to secure payment of a note given to them before that time for the sum of fourteen thousand and eighty and 80-100 dollars; that

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afterwards, in 1868, Patrick, Irwin & Co., assigned and transferred said note and mortgage to plaintiffs; that afterwards, in September, 1868, said J. Decatur Caldwell executed a power of sale, authorizing the said Patrick, Irwin & Co. or their assignees or legal representatives to advertise and sell said lands under said mortgage, there being no power of sale in the mortgage as first executed; that under said mortgage and said power of sale, the present plaintiffs, assignees from said Patrick, Irwin & Co., and transferees of said note and mortgage, advertised, sold and conveyed said lands to one Smith, on the 14th December, 1868, and that Smith subsequently, and before this suit was brought, conveyed to plaintiffs. After the sale, which took place in December, 1868, Caldwell held the premises as tenant of Smith, the purchaser, for near two years, paying rent therefor.

The defense is, that before two years expired, viz: on December 13th, 1870, "defendant redeemed the said lands, by tendering on said 13th day of December, 1870, the said purchase-money with ten per cent. per annum thereon, and all other lawful charges to the said Albert A. Smith, the purchaser as aforesaid; and said defendant avers that by said tender, made as aforesaid by him, he was reinvested with the title to said lands." The above is an extract from the plea of tender, and it contains no averment of a delivery of the money to the clerk of the court, or, that the money is brought into court with the plea. There was a motion to reject, and a demurrer to this plea, assigning this and various other grounds. The Circuit Court overruled the motion and the demurrer, and held the plea good, without the averment that the money was delivered to the clerk.

To authorize redemption by a debtor of lands sold as this was, the statute—Code of 1876, section 2879—requires that he shall "pay or tender to the purchaser or his vendee, the purchase-money, with ten per cent. per annum thereon, and all other lawful charges; and such payment or tender has the effect to reinvest him with the title." The next section of the Code declares that "If the possession of the land has been delivered to the purchaser by the debtor, and upon payment or tender as aforesaid, it is not restored to him, he may recover possession by a suit for unlawful detainer, before a justice of the peace." The section last copied was construed by this court in *Jonsen v. Nabring*, 50 Ala. 392. It was there ruled that in such action of unlawful detainer before a justice of the peace, it was not nec-

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essary to bring the money into court, or to aver it was so brought in; that the justice had no clerk to whom the money could be delivered, and that on appeal, the only objections to the complaint that could be made, were those which could be, and were raised before the justice. The present suit originated in the Circuit Court, is statutory ejectment, and such action, as a rule, can be maintained or defended only on a legal title. The statute declares that either payment or tender has the effect to reinvest the debtor with the title; but it can not be overlooked, that when the tendered money is, for any reason, not accepted, and no reconveyance is executed, the title in fact remains with the purchaser, while the debtor holds the money. Many circumstances may exist which will induce the purchaser honestly to decline the money tendered. He may, in good faith, deny the debtor's right to redeem. Can it be, that the legislature intended to punish such honest mistake with a loss of the land, without a return of the money paid, of which the debtor has had the benefit? "The plea must consist of a succinct statement of the facts relied on, in bar or abatement of the suit."—Code of 1876, § 2987. "A plea of tender of money, or of a thing in action, must be accompanied by a delivery of the money, or such thing in action, to the clerk of the court."—Code of 1876, § 2997. The reason of the rule declared in *Jonsen v. Nabring*, *supra*, does not apply in this case. The Circuit Court has a clerk, as a necessary functionary of its very existence. Nor is the action of unlawful detainer governed by the rules which obtain in ejectment. The one is designed as a speedy, simple and statutory mode of restoring possessions tortiously interrupted, or wrongfully withheld, after the termination of a permissive, or temporary right of enjoyment. In such action title, except as implied in the statute, is immaterial, and can not be put in issue. In ejectment, title—the legal title—is generally the main inquiry.—*You v. Flinn*, 34 Ala. 409. The evidence of title is not always the same. Sometimes it consists in a regular chain of conveyances from the Government down to the litigant. Sometimes it consists of an older, quiet occupancy, which raises the presumption of title that will prevail against a subsequent possession without other sufficient evidence of title.—*Lewis v. Goguette*, 3 S. & P. 184; 1 Brick. Dig. 627, §§ 40, 41; *Anderson v. Melear*, 56 Ala. 621. Sometimes the action is maintained by proof that the defendant went into possession, or retained the possession, as tenant of the plaintiff, thus acknowledging his title, and

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estopping himself from disputing the title under which he entered, or continued to enjoy.—*Henley v. Br. Bank*, 16 Ala. 552. There are other modes of establishing legal title.

We think we but carry out the intention of the legislature, when we hold that the plea of tender in this cause should have been accompanied by a delivery of the money to the clerk; and, it being shown to the court that such delivery had not been made, the Circuit Court should have sustained plaintiffs' motion to reject plea numbered two.

Whether the court rightly ruled in rejecting the copy of the mortgage offered in evidence by plaintiffs, for defects in the certificate of acknowledgment, we consider it unnecessary to decide. The certificate is very informal, and probably insufficient to raise the record to that dignity, which authorizes a certified copy of it to be used as evidence.—See *Sharpe v. Orme*, at the present term; Phil. Ev. ed. of 1850; Cowen & Hill's Notes, part 2, page 462. The power of sale was sufficiently executed, if proved, to justify its admission as evidence. And the power of sale sufficiently refers to, and identifies the mortgage, to validate it and make it binding, even if, in its original execution, it was invalid. The power of sale should have been received in evidence, for the mortgage, if it ever had been invalid, had ceased to be so.—1 Greenl. Ev. §§ 23, 211; 1 Brick. Dig. 801-2, §§ 80, 85. Whether the original mortgage can be produced, or a copy, or its contents shown, are questions to arise on another trial. Production of paper title may not, however, be necessary, if, as averred in defendant's second plea, he held possession for the years 1869 and 1870, as tenant of Smith, the purchaser. This was a recognition that Smith had title at that time, and estops Caldwell from disputing it. This being shown, the onus is then cast on him of showing he has redeemed, according to the rules laid down above.

In the present case the plaintiffs took a non-suit with a bill of exceptions, in consequence of the adverse rulings of the Circuit Court. We have shown that the Circuit Court erred in its rulings. The usual consequence in such case is, to set aside the non-suit, and reverse and remand the cause. A point, however, not noticed in the briefs, renders such practice improper in the present case. Smith purchased at mortgage sale, December 14th, 1868, and received a conveyance of the title. Caldwell made the tender December 13th, 1870, and thenceforth renounced his tenancy, and claimed to occupy in his own right, if the averments of his second plea be true. He thus threw off allegiance to his landlord,

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Smith, and became an adverse holder, claiming right. In 1872, near two years afterwards, Smith conveyed the lands to Alexander and others, by whom the present suit was brought. It is thus shown that when the present plaintiffs acquired their title, the lands were in the adverse possession of Caldwell. A suit, on a title thus acquired, can not be maintained, because of its violation of the rules against maintenance.—*Bernstein v. Humes*, 60 Ala. 582. Such deeds are not void, but are binding, by way of estoppel, between the parties.—*Ib.* 60 Ala 604. Inasmuch as the present suit in the names of the present plaintiffs can not be maintained, the erroneous rulings of the Circuit Court were error without injury.

Judgment of non-suit affirmed.

Tyson v. The South & North Alabama Railroad Company.

Action against Railroad Corporation to recover Damages for Personal Injuries suffered by Employee.

1. *Corporation; what duty owes employes, in selection of fellow-servants.*—A railroad corporation owes a duty to its employes, to exercise due care and diligence in the selection and appointment of their fellow-servants, and is answerable for injuries resulting from its want of care or skill, in these respects; though if these have been observed, it is not responsible to one servant, for injuries resulting from the negligence of his fellow-servant.

2. *Same; delegation of power of appointment, effect of.*—Whoever exercises the power of appointing and removing employes or servants, though his grade of employment as to other matters, makes him their fellow servant, exercises a corporate function; and though he be ever so competent himself, and due care has been exercised in selecting him for that purpose, his negligence or mistakes in selecting employes, are the negligence or mistakes of the corporation, for which it must answer.

Appeal from Montgomery Circuit Court.

Tried before Hon. JAMES Q. SMITH.

The appellant, Samuel Tyson, brought this action against the appellee, the South and North Alabama Railroad Company, to recover damages for personal injuries sustained while in its service, by reason of the negligence of defendant in appointing as engineer one Lovelace, an incompetent and unfit person, by whose carelessness and unskillfulness

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plaintiff's leg was caught and injured while engaged in coupling cars.

The evidence showed that plaintiff was engaged in the service of defendant as a car coupler, and that while thus engaged, he received the injuries complained of. There was evidence tending to show that plaintiff was injured, without fault on his part, by reason of the negligence or ignorance of the engineer, one Lovelace, who was in charge of the engine; though there was also evidence tending to show that plaintiff was not without fault. "On the night when the injury occurred, the regular night engineer was excused for sickness, and the regular day engineer complained of being tired, and thereupon the yard master of defendant, one Hunt, who was invested with authority to appoint and remove engineers at will, and who was proved to be a competent and skillful man for his position, put one Lovelace in charge of the engine, without the consent or knowledge of plaintiff," and while said Lovelace was thus in charge of the engine, without plaintiff's knowledge or consent, plaintiff was injured, as above stated, by said Lovelace's ignorance or negligence.

Several witnesses testified that they had known Lovelace for several years, during all of which time he had been a fireman; that they had never known or heard of his having had charge of an engine before, though it was possible that he might have acted as engineer during part of that time, without their knowing it. Lovelace had been in service of defendant for four or five months as a fireman, and the day after the accident, returned to duty as a fireman, and so continued until he left defendant's service. The foregoing was all the evidence as to the competency or incompetency of Lovelace as an engineer.

The court charged the jury, if they found from the evidence that "at the time of the injury complained of, plaintiff was an employe of the defendant as a coupler of railroad cars, and that Hunt was also an employe of said defendant, authorized to discharge and employ engineers, and you find further, that Hunt employed Lovelace to direct the engine used in coupling cars, and it appears from the evidence the injury complained of, was the result of negligence, want of due care and skill on the part of Lovelace, which want of skill in Lovelace was not known to defendant, then I charge you that the plaintiff ought not to recover."

To this charge plaintiff duly excepted.

At the request of defendant, the court gave the following charge: "If the jury believe from the evidence, that the

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South and North Alabama Railroad Company employed an experienced yard master, whose duty it is to select engineers and the like, in the operation of the trains and in prosecution of the business of defendant, and that said yard master made a mistake, or did not use proper diligence in the selection and appointment of the man Lovelace, through whose alleged negligence the plaintiff, (an employee of the defendant corporation), was injured, the negligence or mistake of said yard master, unknown to the defendant, is not, as to the plaintiff, the negligence of the corporation. Such mistake or negligence in that regard are the negligence of a servant in the course of his employment, and is within the meaning of the rule which forbids a recovery against the master for injuries done to a servant by the negligence of his fellow-servant; and if the jury believe this state of facts, then the plaintiff is not entitled to recover, and the verdict of the jury must be for the defendant." To the giving of this charge, the plaintiff also accepted, and now assigns the giving of these charges for error.

ARRINGTON & GRAHAM, and C. W. FERGUSON, for appellant.

RICE, JONES & WILEY, *contra*.

STONE, J.—In the case of *The Mobile and Montgomery Railroad Co. v. Smith*, 59 Ala. 245, we decided that Jordan, the superintendent of the road, and O'Brien, the supervisor of that part of the road, on which the injury complained of was done, were fellow-servants of Smith, the brakeman, who was plaintiff in that suit. In that case we said: "It is proved that Jordan, the superintendent, O'Brien, the road supervisor, Price, a section master to whom blame is ascribed, and Mitchell, the engineer of the train, were all of them competent, prudent, and experienced in the several duties to which they were respectively appointed. These were all the persons in any way chargeable with the mishap, who were concerned in the service." The fault which led to the injury complained of, was chargeable to one or more of the above named employees or servants of the railroad corporation. But the fault was committed in that case by one or more of the servants aforesaid, while they and Smith were acting in the common business of the same master, the railroad corporation. We held that the railroad was not responsible in that case for injury done the plaintiff, by the negli-

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gent performance of duty by a fellow-servant. That case was distinguished from *Walker v. Bolling*, 22 Ala. 294; and the principle announced in the older case was not intended to be impaired. In the later case we said: "In *Walker v. Bolling*, this court held that where there is a general manager or superintendent, who is invested by the common employer with the duty and authority of employing and dismissing the inferior agents and servants who are under him, the master is responsible for acts of negligence on the part of the superintendent in failing to exercise due care and diligence in the employment of competent agents, or in not dismissing those who are proved to be incompetent." The distinction may appear to be a narrow one, but we think it is founded in solid reason. In the one case the servant simply performs the labor assigned him. He has no authority or power to sublet, or delegate the service to another. If his principal, the railroad corporation, has selected him with care; if he possess the requisite skill, qualifications and good character, then the corporation, which speaks and acts through its officials, has done its duty, and will not be held to account to another servant or employe for any injury that may have resulted from the fault or negligence of such accredited first mentioned employe. Such is the weight of authority, and such are our decisions. We have no desire to overturn them.—*M. & O. R. R. Co. v. Thomas*, 42 Ala. 672. In the case cited, our predecessors used the following language: "There are perils incident to the servant's employment, against which caution and prudence can not perfectly guard. Those perils and risks the servant must be presumed to know as well as the master, and when he contracts, he must be understood to assume them, and stipulate for a compensation apportioned thereto. It is in this that the relation of a railroad corporation to passengers differs from its relation to servants. The principle has been so often declared, both in England and in this country, that it has ceased to be disputable." See, also, the authorities collected and collated in the able opinion in that case.

But the question we have been discussing is not the question in this case. The bill of exceptions states "that on the night when the injury occurred, the regular night engineer was excused for sickness, and the regular day engineer complained of being tired, and thereupon the yard master of the defendant, who was invested with authority to remove and appoint engineers at will, and who was proved to be a competent and skillful man for his position, put one Love-

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lace in charge of the engine, without the consent or knowledge of the plaintiff; and while said Lovelace was, without plaintiff's knowledge, acting as engineer, and by reason of the ignorance or negligence before stated, plaintiff was hurt." There was testimony tending to show that Lovelace was not a competent engineer. It appears then that part of the administrative functions of the corporation were confided to sub-agents and employes. Such practice may be, and probably is, necessary, in the control and government of so large a corporation as a railroad usually is. But, the performance of such delegated power by the sub-agent or employes is the act of the corporation, and the corporation is responsible for its faithful and prudent performance, to the same extent as if the service were performed by the highest officer of the corporation. The selection and removal, at will, of engineers in control of locomotives, is a high and responsible function, and the consequences of errors, or misplaced confidence therein, are too fearful to be lightly passed over. The railroad corporation must not only have a competent and skillful man for this position, but he must prove his competence and skill by selecting competent and skillful persons to execute his orders. Failing to do so, the railroad corporation he represents is accountable for the injury resulting from such failure. This, we understand, is the result of the principle declared in *Walker v. Bolling*, *supra*, which was reaffirmed in *Cook v. Parham* 24 Ala. 21. Speaking on this question, Chief-Justice WALKER, in *M. & O. R. R. Co. v. Thomas*, said: "The master is answerable that the servants shall be persons of ordinary skill and care. This qualification has been twice announced in this State. The precise shape of its statement is, that it is the master's duty to use due care in procuring competent servants or officers, and he is responsible for a failure to discharge that duty. With this qualification the rule above stated, which prevails in England, must be regarded as established in this State." The rule referred to is, that the master is not responsible to one servant for injury caused by the fault or negligence of another. And so we hold that while the railroad company is not responsible to Tyson for injuries which he sustained by the fault or neglect of Lovelace, provided the latter was a competent and skillful engineer, yet, if he was not competent and skillful, then the corporation is responsible to Tyson for any injury that resulted from such want of competence and skill.

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The rulings of the Circuit Court were not in harmony with the views above expressed.

Reversed and remanded.

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Action against Carrier to recover Overcharges and Penalties, &c.

1. *Case adhered to.*—The court adheres to its decision in *State, ex rel. Harrell, v. Mobile and Montgomery Railway Company*, 59 Ala. 325, that the second section of the act of April 19th, 1873, which provides that railroad companies "may for the transportation of local freight, demand and receive not exceeding fifty per cent. more than the rate charged for the transportation of the same description of freight, over the whole line of its road,"—does not authorize the addition of fifty per cent. on the charge over the whole road, irrespective of the distance the freight may be carried, but only an additional fifty per cent. more per mile, for the distance local freight is carried, than the per mile rate charged on goods carried over the whole line.

2. *Act of April 19th, 1873, construed.*—The rate on freight "*carried over the whole line of its road*," which furnishes the basis for the additional fifty per cent. allowed by that act, for the transportation of "local freight," is the rate charged on freight taken on at one terminus and discharged at the other; and not the rate for freight brought from or carried to a point beyond the termini of the road.

3. *Same.*—The rate which furnishes the basis on which local freight charges must be graduated, is the rate prevailing at the time of the shipment; and rates at any particular time in the past furnish no reliable guide for ascertaining present rates.

4. *Corporation formed under act to constitute the purchasers of a railroad, &c., a body corporate; rights and powers of.*—When the purchasers of a railroad form a corporation under the provisions of the statute—act "to constitute the purchasers of any railroad heretofore sold under authority of any law of this State, a body corporate and politic," approved December 17th, 1873, and amended March 20th, 1875—the new corporation succeeds to the franchises, faculties and powers of the old corporation precisely as surrendered or lost; though as to ownership of property and liabilities, it is a new corporation.

5. *Effect of acceptance of restrictions on corporate power not embodied in charter.*—If a railroad corporation, though originally chartered without restrictions as to the right to fix tolls, accepts a limitation or restrictions of such powers, on a valuable consideration—*e. g.*, as one of the conditions on which it receives aid from the State—such limitation inheres in its organic law, precisely as if originally incorporated therein; and a new corporation, formed by those purchasing its property, &c., under our statutes, succeeding only to the rights of the old, is bound by such limitations.

6. *Imposition of penalty; when not invasion of chartered rights.*—Where a law when a corporation is formed, or which it afterwards accepted, exacts certain duties of it, a subsequent statute imposing a penalty, where none existed before, for a failure to perform such duties, does not impair any corporate right or otherwise violate the constitution.

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7. *Voluntary payment; what not.*—The nature of the business considered, the shipper does not stand on equal terms with the carrier, in contracting for charges for transportation; and if the shipper pays the rates established in violation of law by the carrier, rather than forego his services, such payment is not voluntary, in the legal sense, and the shipper may maintain his action for money had and received, to recover back the illegal charge.

8. *Constitution 1868; effect of, as to power to amend charter.*—The act to constitute the purchasers of any railroad, &c., a body politic and corporate, having been enacted, since article 13 of the constitution of 1868 became operative, and it, and similar provisions in the present constitution providing that the general laws, under which corporations may be framed, may be amended, altered or repealed, corporations thus formed are subject to legislative control.

9. *Act of April 19th 1873; penalties imposed by, not repealed.*—The penalties imposed by act of April 19th, 1873, are not repealed by the provisions of the "act to prevent excessive charges by railroad companies," approved March 17th, 1875.

10. *Effect of act repealing "act to furnish the aid and credit of the State of Alabama, for the purpose of expediting construction of railroads within the State."*—The repeal of the act under which the aid and credit of the State were extended to railroads, upon conditions therein recited, does not have the effect to release them from the restraints imposed by the 15th section of that act as to tolls and charges; nor to release the Mobile and Montgomery Railroad Company, to whose rights the appellant succeeded, from the restrictions imposed by section eight of the special act, under which the Mobile and Montgomery Railroad Company obtained State aid.

APPEAL from the Circuit Court of Butler.

Tried before Hon. JOHN K. HENRY.

The appellees, Steiner, McGehee & Co., brought this action against the appellant, the Mobile and Montgomery Railway Company, on the 14th day of February, 1876, to recover certain penalties which the complaint alleged the railway company had incurred, at various times, between the 21st day of April, 1875, and the 1st day of December of that year, by violating the provisions of the second section of "an act regulating the charges for transportation of freight upon railroads within this State," approved April 19, 1873. Some of the counts also sought to recover the amount of overcharges illegally exacted on freights, between the 1st day of December, 1875, and the 4th day of February, 1876.

The counts were two hundred and sixty-nine in number, but it is unnecessary to notice them in detail. The complaint, as amended, sets out the act authorizing the Governor to endorse the bonds of the Mobile and Montgomery Railroad Company, the acceptance of its provisions by that company, the issue of the bonds and a trust deed to secure the same, and the organization of the defendant corporation by the purchasers, at a sale under a decree in chancery for foreclosure,—all of which matters are hereinafter fully set forth.

The defendant demurred to each count of the amended

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complaint, on the ground, among others, that the act of April 19th, 1873, under which the plaintiff claims, was repealed by an act of the general assembly approved March 17, 1875. Defendant also demurred separately to each count, because the act of the general assembly approved April 19, 1873, and under which plaintiff claims, is unconstitutional as to defendant. This demurrer was overruled.

So much of the act of April 19th, 1873, under which the complaint was framed, and of the act of March 17th, 1875, which it was claimed had the effect to repeal the former law, as is necessary to a proper understanding of the points thus raised on demurrer, is given below.

The second section of the act of April 19th, 1873, enacts that all railroad companies in this State "may for the transportation of local freight demand and receive not exceeding fifty per cent. more than the rate charged for the transportation of the same description of freight over the whole line of its road; and any railroad company, manager, agent, or officer, violating the provisions hereof, shall be liable to the party injured thereby in double the amount of the overcharge; but in no case shall the penalty be less than \$20."

The act to prevent excessive charges by railroad companies, approved March 17th, 1875, declares, "that any officer, manager, or agent of any railroad company, lessee, association or corporation, managing or operating any railroad in this State, who violates the provisions of an act, entitled an act regulating the charges for the transportation of freight upon railroads within this State—approved April 19th, 1873—shall be guilty of a misdemeanor, and upon conviction thereof, shall be fined not less than one hundred, nor more than five hundred dollars for each offense."

On the same day, an act was passed repealing the "act to furnish the aid and credit of the State of Alabama for the purpose of expediting the construction of railroads within this State"—approved February 21st, 1870. This was the "general law passed at the present session," to which reference was made in the act hereinafter noticed, authorizing the endorsement of the bonds of the Mobile and Montgomery Railroad Company.

The defendant filed several pleas, and among them, two pleas setting up in substance the facts hereinafter stated as to the organization of the defendant corporation, and that at the time the law of April 19th, 1873, was enacted, under which the special counts were framed, the rates for transportation for freight over the line of railroad, now owned by

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defendant, were regulated by section eight of the act to "authorize the Governor to endorse the bonds of the Mobile and Montgomery Railroad Company," and that neither the said Mobile and Montgomery Railroad Company, nor this defendant, ever accepted or consented to be governed by the provisions of the act approved April 19th, 1873; wherefore defendant is not liable to the penalties sued for in the special counts. The court sustained a demurrer to each of these pleas.

The evidence shows that the Mobile and Montgomery Railway Company, the appellant, was formed in this wise:

Under an "act to incorporate the Alabama and Florida Railroad Company," approved February 11th, 1850, a company was chartered to build and operate a railroad from the the city of Montgomery, Alabama, towards the city of Pensacola, Florida. This charter contained the usual provisions, and by its fifteenth section provided, that "after the completion of said road, or any part thereof, the said president and directors may levy and collect tolls from all persons, property, merchandise, and other commodity transported thereon; *provided*, the net profits shall not exceed twenty-five per cent. per annum."

This road was finished to the State line, near Pollard, Alabama, in the year 1861.

On the 15th day of February, 1856, the legislature of this State passed "an act to incorporate the Mobile and Great Northern Railroad Company." By this act a company was incorporated to build and operate a railroad "from the city of Mobile to a point on the Alabama and Florida Railroad," &c. The seventeenth section of this charter enacts, "that the directors shall have full power to establish such rates of tolls for the conveyance of persons and property upon the railroad, as they shall from time to time deem proper, and to levy and collect the same for the use of said company. All matters and things respecting the use of said railroads and the conveyance of passengers and property, shall be in conformity to such rules and regulations as said board of directors shall from time to time determine." This road was completed and operated from Pollard to Tensas, Alabama, before the year 1866.

Afterwards, the legislature passed "an act to consolidate and make joint stock of the Mobile and Great Northern Railroad Company, and the Alabama and Florida Railroad Company of Alabama, and to change the name of said company to the Mobile and Montgomery Railroad Company," ap-

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proved August 8th, 1868. This act gave these companies "full authority to make joint stock of the two companies and to consolidate said companies into one corporation, by the corporate name of the Mobile and Montgomery Railroad Company," pursuant to the action of the stockholders of the companies, at their conventions.

The fourth section of this act provided, "That the said Mobile and Montgomery Railroad Company shall have all the rights, privileges, property, franchises and immunities, not inconsistent with those granted by this act, which have been given, granted, and confirmed to the said Mobile and Great Northern Railroad Company, and the Alabama and Florida Railroad Company, and the same are hereby given, granted, and confirmed to the said Mobile and Montgomery Railroad Company."

The two companies accepted the provisions of this act, and were duly consolidated under it.

On the 25th of February, 1870, the legislature passed "an act to authorize the Governor of the State of Alabama, to endorse on the part of the State, the first mortgage bonds of the Mobile and Montgomery Railroad Company."

This act authorized the Governor to endorse the first mortgage bonds of the company for the sum of two million five hundred thousand dollars, for the purpose of discharging existing liens upon its property, repairing and equipping its road between Montgomery and Tensas, and extending and completing it from Tensas to Mobile, which was required to be done by the first day of July, 1872.

The eighth section of said act provides "that the endorsement of the bonds of the Mobile and Montgomery Railroad Company as herein provided for, is conditioned that on and after the time fixed for the completion of said railroad from Tensas to Mobile, the Mobile and Montgomery Railroad Company shall transport passengers and freight at the same rates as provided for other roads in the general bill passed at the present session, to furnish the aid and credit of the State to expedite the construction of railroads."

The fifteenth section of the general act referred to, enacted that "as a condition on which the aid is granted by this act, the several railroad companies shall not charge more than four (4) cents per mile for each passenger traveling over their lines, and shall not charge more than twenty-five (25) per cent. higher rates for carrying local freight, than they will for carrying through freight; nor shall they discriminate unfavorably against any citizen of Alabama in respect of any of the benefits or privileges of their road."

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The Governor endorsed the first mortgage bonds of the Mobile and Montgomery Railroad Company to the extent of \$2,500,000, and it completed the road to Mobile within the prescribed period.

To secure the bonds thus issued, the Mobile and Montgomery Railroad Company executed and delivered a deed of trust to Philo C. Calhoun, Timothy H. Porter and Josiah Morris, which conveyed the railroad from Mobile to Montgomery with all its franchises, equipments, &c., to said parties in trust, for the benefit of persons who might hold the endorsed bonds. The deed of trust authorized the trustees in case of default in either principal or interest, to take possession of the road and operate it, and pay the amount out of the earnings thereof, and if these were insufficient, to sell the property conveyed, and if necessary to bid in the same for the protection of the bondholders.

Default having been made in the payment of interest, the trustees on the 13th day of September, 1873, filed their bill against the railroad company for a foreclosure of the mortgage and a sale of the property therein conveyed. The railroad company answered, and such proceedings were had thereon, that a decree was rendered in May, 1874, ordering a foreclosure of the mortgage and a sale of the property conveyed therein, which provided among other things, that the trustees might purchase for the benefit of the holders of the bonds. On the 10th day of November, 1874, the property was sold under this decree and purchased by the trustees for the benefit of the bondholders. The sale was reported to, and confirmed by the court at its November term 1874, and the register ordered to execute a conveyance to the trustee for the benefit of the bondholders. "A majority in interest of said bondholders were duly incorporated under the name of the Mobile and Montgomery Railway Company, under the act of the general assembly to constitute the purchasers of any railroad hereafter sold under authority of any law of this State, a body corporate and politic, approved December 17th, 1873, and the act amendatory thereof, approved March 20th, 1875."

The act of December 17th, 1873, enacts among other things "that in each and every case in which any railroad may hereafter be sold by the State of Alabama, or by any commission, officer or agent of said State, or under any proceeding judicial or otherwise authorized by law, the purchasers at any such sale may constitute themselves into a body politic and corporate, and shall have and possess all

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the powers and franchises which belonged to the company, or corporation originally owning the railroad so purchased, including the power to purchase and hold real estate, and the franchise to be and exist as a corporation under such name as the purchasers may select and adopt. The board of directors of such new corporation shall have power . . . to lease, sell, or mortgage all or any part of the franchises or property of such corporation, including the franchise to be and exist as a corporation."

An amendment was passed March the 20th, 1875, the second, third and fourth sections of which are as follows :

"Sec. 2. Be it further enacted, that the word purchasers, as hereinabove used, in every case where the same occurs, be and the same hereby is declared to comprehend and mean, not the trustees merely making the purchase, but the persons for whom, in whose behalf, for whose benefit or advantage, or in trust for whom, such railroad is so purchased, being the persons who part with the actual consideration of such purchase; and in every case a majority in interest of such purchasers may organize such corporation, for the benefit of themselves and of all other persons having like interest in such purchase who desire to unite therein.

"Sec. 3. Be it further enacted, that the meaning and intentment of said word hereinabove declared, shall be accepted and received in all courts and places, in respect of any attempt at incorporation under said act, heretofore or hereafter made, in the same manner and to the same extent as if the same had been originally declared in said act; *Provided, always*, that the rights of any and all persons vested before the taking effect hereof, shall not be impaired or affected thereby.

"Sec. 4. Be it further enacted, that every body corporate and politic heretofore or hereafter organized pursuant to the provisions hereof, or of said act hereinabove referred to, within sixty days from the taking effect of this act, or within sixty days from the date of its organization, under the hand of its proper officer or officers, shall make and file its certificate in writing in the office of the Secretary of State of the proceedings had for its organization."

The evidence introduced on the trial shows that the plaintiffs were merchants doing business in Greenville, Ala., and during the periods mentioned in the complaint, and at various times, shipped over defendant's road large quantities of goods and twenty-nine hundred and thirty two bales of cotton. The distance by defendant's road from Greenville to Mobile

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is one hundred and thirty-five miles, and from Greenville to Montgomery is forty-five miles. The charges upon cotton were two dollars and thirty cents per bale from Greenville to Mobile, and one dollar and fifty cents per bale from Greenville to Montgomery, and this charge was uniform from April 21st, 1875, to February 4th, 1876.

The evidence further showed that defendant refused to allow plaintiffs to have their cotton taken from defendant's warehouses, until the rates above set forth were paid or agreed to be paid, though on some occasions, the agent would send out the first load of the freight with the bill of charges, with the understanding that the bill would be paid when demanded, and but for such understanding, would not have allowed the freight to leave the warehouse, without prepayment of charges. Plaintiffs made a general complaint to Wilson, the defendant's agent at Greenville, and to Jordan the superintendent, that the charges for the transportation of said cotton and other freight were too high, but defendant refused to allow plaintiffs to have their cotton or goods, until the above rates were paid or agreed to be paid.

Plaintiff was introduced as a witness and asked "what was the distance from New York to Montgomery by the shortest railroad route. The defendant objected to the question as illegal and irrelevant. It was shown that the plaintiff had had various parcels of goods shipped from New York to Montgomery, and then the same goods shipped from Montgomery to Greenville on defendant's road, and it was proposed to be proved, what the through freight from New York to Mobile was for merchandise by connecting lines under special arrangements as herein stated, and that the different railroads from New York to Mobile pro-rated the freight according to distance. The court overruled this objection and defendant excepted. The witness answered that the distance was about twelve hundred miles."

The plaintiffs, against the objection and exception of defendant, were permitted to introduce the testimony of witnesses, as to the charges they had paid, during the periods laid in the complaint, on cotton and other freight from Selma and Benton, Ala., by way of the Western Railroad to Montgomery, and thence over defendant's road from Montgomery to Mobile, and on similar freight shipped from St. Louis and New Orleans over defendant's road from Mobile to Montgomery. It was shown that as to these freights, defendant pro-rated with the connecting railroads and other routes of communication, according to the distance such freight was

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transported." It appeared from this testimony, that the freight charged by the defendant on the cotton and other goods shipped from Greenville, exceeded fifty per cent. more than the rate charged for the transportation of such freight carried over the whole line of its road, which it had received from connecting lines with which it pro-rated, according to the distance which the freight was carried. The testimony showed that the rates for the transportation of freight from Montgomery to Mobile and from Mobile to Montgomery, were constantly changed. The president and directors never fixed the tariff, but left that matter to one Nason, the general freight agent. Some of these tariffs were printed and some not. The local freight agent, introduced as a witness, could not recollect what the tariff rates were at any one time from April 21st, 1875, to February 4th, 1876. A printed paper dated September 1st, 1875, which was shown to be a local tariff of rates for transportation of freight was handed the witness, but the witness could not tell when it went into effect or to what extent it was used. This paper showed the rates charged by defendant for the transportation of freight from Greenville to Montgomery, and from Greenville to Mobile, and *vice versa*.

The court gave a general charge to the jury, to several specified parts of which charge the defendant excepted.

The defendant requested thirty-one written charges, thirteen of which were given, and the remainder refused, and to which refusals it excepted.

Some of the charges refused, instructed the jury; 1st, that the defendant was not amenable to the provisions of the act of April 19th, 1873; 2d, that if plaintiff shipped his goods, knowing beforehand what rates were charged, and paid these rates without protest, the payments were voluntary, and could not be recovered back; 3d, that the defendant had power and authority to change its rates from time to time, and that proof of the rate charged at any particular date was not evidence of what rates prevailed before or after that time, because the defendant has failed to prove the rates at such subsequent and different times; 4th, the defendant had a right to charge for the transportation of local freight, fifty per cent. more than the amount charged at the same time for the transportation of the same description of freight from one of its termini to another; and if defendant did not exceed this amount, then it is not liable under any of the counts in the complaint.

There was a verdict and judgment for plaintiff for the sum of \$5,155.75, and defendant appealed.

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The rulings on demurrer, the rulings upon the admission of evidence, the charge given, and the refusals to charge as requested, are now assigned as error.

GREGORY L. SMITH, for appellant.—When the provisions of two statutes are repugnant, the latest prevails,—see *Dwarris on Statutes*, p. 156; note *Dash v. Van Kleeck*, 7 Johns., 496-7; *Columbia Manufacturing Co. v. Van Pool*, 4 Cow. 556; *Jordan v. The State*, 15 Ala. 746—and operates a repeal of the former.—*Harrington v. Trustees of Rochester*, 10 Wend. 550; *Bac. Abr.* title Statutes, D.

When two statutes provide different penalties for the same offense, they are repugnant.—See *Nichols v. Squire*, 5 Pick. 168; *Commonwealth v. Kimball*, 21 Pick. 373; *Flatherty v. Thomas*, 12 Allen, 428; *Norris v. Crocker*, 13 How. 438.

This is so, although the latter statute provides the smaller penalty.—See *State v. Whitworth*, 8 Por. 435. And it is immaterial whether both penalties accrue to the State, or the first to an individual and the last to the State.—5 Pick. 168; 13 How. 438. A statute giving the party injured an amount in excess of the injury, is penal.—See *Stone v. Lannon*, 6 Wis. 497; *Reed v. Davis*, 8 Pick. 515-516.

This suit is brought under an act that restricts the rate of freight, and provides a penalty for its violation. A later act makes the violation of the terms of this act a misdemeanor, punishable by fine, and, therefore, repeals the former act.

When an act repeals a part of an act and substitutes other terms in lieu of the portion stricken out, it is said to amend such former act.—See *Longlois v. Longlois*, 48 Ind. 49; *Bac. Abr.* title Statute, D.

An act approved February 21st, 1870, provided, among other things, that railroads should not charge more than twenty-five per cent. higher rates for carrying local freight than they do for carrying through freight. The act under which this suit was brought was passed in 1873, and provided that railroads might charge a different rate. It therefore amended the act of 1870. The act of 1870, and all acts amendatory thereof, were subsequently repealed by an act of 1875, and I submit that the act under which this suit was brought was thereby repealed.

The appellant was organized under the general law of Alabama (Acts 1874-5, p. 132), allowing the purchaser of railroads to reorganize. Its meaning should be construed in the light of the reasons that led to its passage.—*Dwarris on Stat.* p. 655; *The Schooner Harriet Boynton et al. v. Claim-*

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ants, 1 Story R. 251; *Harrison v. Walker*, 1 Ga. R. 32; *Wakefield v. Phelps*, 37 N. H. 295. From 1861 to 1865 the few railroads in the State were in a condition that rendered them useless. A thorough system of railroads was essential to the prosperity of the State; but the war had rendered the people too poor to build them without assistance from foreign capital, and capital would not invest without further security than that afforded by the property.

By an act of 1867 (Acts of 1866-7, p. 686), the State authorized an endorsement of railroad bonds. The same act provided that in case of default the State should take charge of the property to protect itself. *This act placed no restriction upon freight.*

To enable the State to dispose of any property that might thus get into its hands, an act was passed allowing the purchaser to reorganize with the powers and privileges of the *existing charters*.—See act August 12th, 1868. Several acts were then passed relating to the same subject, but applicable only to particular corporations. The next general act was passed in 1870, (Acts 1869-70, p. 149). This act restricted the right to charge for freight.—See § 15. There followed several other acts on the same subject, but applicable to particular roads. In 1872, the State found many of the roads for which it had endorsed defaulting in the payment of interest, and that it had incurred a liability of \$18,291,000. See report of Commissioners to adjust the debt of Alabama. The State took control of the Alabama and Chattanooga Railroad under the provisions of the act of 1870, but found no relief in the management of the property, and it became evident that unless something was done, the State would soon be encumbered with every road in its territory. It passed a series of acts offering large inducements for relief, (see act of December 21st, 1872, Acts of 1872-3, p. 52, and act of April 14th, 1873, Acts 1872-3, p. 53; act of April 15th, 1873, Acts of 1872-3, p. 58; act of April 21st, 1873, Acts 1872-3, p. 45), and among the inducements was a release from *all restrictions*, including restrictions on freight. The act of April 16th, 1873, Acts 1872-3, p. 59, was then passed, and it offered a release from *restrictions on freight, as a special inducement* to parties to relieve the State. The act of 1873 as amended, under which defendant was incorporated, had the same object in view; and it should be construed in harmony with this object.—*Noble v. State*, 1 Green. (Iowa) 325. This act gave the defendant all the powers and franchises of the company *originally* owning the road. The

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companies originally owning the road were the Alabama and Florida Railroad and the Mobile and Great Northern Railroad, and among their powers was the right to regulate their own freight.

But if the defendant only took the powers and franchises of the Mobile and Montgomery Railroad Company, they would not be subject to the restriction. The acceptance of the act of 1870 by the Mobile and Montgomery Railroad only created a contract between it and the State, and did not affect its charter; and the defendant is not subject to the Mobile and Montgomery Railroad Company's contracts. *Hall v. M. & M. Railway Co.* 58 Ala. 18.

The question of the defendant's chartered right to regulate its own freight would be free of doubt, but for article xiv. § 1 of Constitution of 1868; and that section provides for the repeal of the *general law only*, and not for the repeal of any right vested under such general law while it exists.—See Smith's Commentaries on Constitutional Construction, § 60, *et. seq.*; 5 Iowa (Clarke), 300; *North Canal Shore Railroad Case*, 10 Watts, 351.

It is clear that the framers of the constitution of 1875 so considered the law; for *in addition* to the clause in the constitution of 1868, they provide (art. xiv. § 10, and art. i. § 32,) for the repeal or alteration of *the charter granted under such general laws*.

The act under which appellant was organized was passed subsequent to the act under which this suit is brought, and repeals it so far as they are inconsistent. The act under which this suit was brought restricts freight, while the act of incorporation gives an unrestricted right to charge for freight. The latter, therefore, repeals the former in this respect.

Appellee claims that the State has a right to regulate freights, even where the company has a chartered right to regulate its own freight; the contrary is too well settled for discussion.—See *Central Railroad and Banking Company v. Georgia*, 2 Otto, 665; *S. W. R. R. Co. v. Ga.* id. 677; *New Jersey v. Yard*, 5 Otto, (95 U. S.) id. 679.

The evidence shows that the overcharges were made by the company's agents, and does not show that the company ever authorized or ratified the overcharge. Authority to do an illegal act can not be inferred from general agency. See *Patterson v. State*, 21 Ala. 571; *Seilbert v. State*, 40 Ala. 60; *Nall v. State*, 34 Ala. 262; *Morton v. Bradley*, 30 Ala. 683.

The right and the remedy are statutory and sufficient, and

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must be averred to bring the offense within the terms of the statute.—*Smith v. Woodman*, 28 N. H. 520. All the facts necessary to constitute the offense must be averred.—5 Johns. 324; 13 Barb. 209; 13 Johns. 428; 4 Johns. 193; 17 Johns. 438; 7 Johns. 402; Minor R. 420; 7 Por. (Ala.) 284. No recovery can be had under the common counts. 54 Ala. 30; 5 Johns. 174; 5 Mass. 314; 55 Ala. 408; 7 Hill, 575; 3 N. Y. (Const.) 1.

The evidence showed that the freight was voluntarily paid. 1 Ala. 406; 5 Ala. 294; 21 Ala. 750; 2 Cow. 419.

Proof showed that freights changed frequently. Proof of a thing, not continuous in its nature, at any one time, is no evidence that it continued the same.—3 Phillip's Ev., Cowen and Hill's notes to, p. 437, p. 452; *Hart v. Newland*, 3 Hawk's Law and Eq. 122; Starkie's Law of Evidence, pp. 76 and 760; 8 Ala. 96; 4 B. & A. 161; 20 Ala. 294; 4 Metc. 545.

Under the act of 1873, but one penalty can be recovered. 46 N. Y. 644; 50 N. Y. 693.

CLOPTON, HERBERT & CHAMBERS, for appellant.—1. The Mobile and Montgomery *Railway* Company is not subject to, or governed by, the provisions of the act of April 19, 1873, under which this suit is instituted.

The incorporation of the Mobile and Montgomery Railway Company under the act of December 17, 1873, as amended by the act of March 20th, 1875, was a contract between the State and the corporators. "The theory of corporation is, that the privileges are conferred upon them in consideration of public benefit which will result from their operations. The production of such benefit constitutes the 'public service' for which the constitution permits the grant of peculiar privileges."

"This public benefit is deemed a sufficient consideration for a grant of corporate privileges." . . . This court expressed the same idea in the old case of *Aldridge v. Tusculumbia Railroad Co.*, 2 Stew. & Port. 211; *Daughdrill v. Ala. Life Ins. & Trust Co.*, 31 Ala. 91-98; *Jemison v. Planters & Merchants Bank*, 20 Ala. 167.

The legislative inviolability of the charters of private corporations was established by, and has been recognized ever since the decision of the Supreme Court of the United States in *Dartmouth College v. Woodward*, 4 Wheat. 518; *Planters Bank v. Sharp*, 6 How. 301; Cooley on Const. Lim. 279; 18 Wallace, 206; 5 Otto, 679.

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2. When we consider the legislative and public history of the State, of which the court has judicial knowledge, it is evident that in the act of December 17, 1873, as amended by the act of March 20, 1875, authorizing purchasers of railroads to incorporate, there was a well understood subject of contract. The State had become liable to the amount of millions of dollars by its endorsements on the bonds of railroad companies. The purpose of the State was to be freed from this liability, and to this end, by said act, as amended, offered inducements to persons to become purchasers of railroads; the principle one of which was that they might constitute themselves into a body corporate and politic, and have and possess all the *powers* and *franchises* which belonged to the company originally owning the railroad.

It is too clear to be controverted at this day, in view of the foregoing authorities and facts, that the incorporation of the *Mobile and Montgomery Railway Company* was a contract between the State and the corporators, and gave and granted to them, at least, the *powers* and *franchises* which belonged to the *Mobile and Montgomery Railroad Company*.

Now, it must be observed that the act of April 19, 1873, "regulating the charges for transportation of freight," etc., under which this suit is brought, was passed several months prior to the passage of the act of December 17, 1873, authorizing purchasers of railroads to incorporate. This act of December 17, 1873, as amended by the act of March 20, 1875, is the last expression of the legislative will in respect to the powers and franchises of corporations formed according to its provisions. It is a special act to provide for special cases; and no reference whatever is made, in any part of it, expressly or impliedly, to the said act of April 19, 1873. If there be a conflict between them, the statute last enacted must prevail. And if there be no conflict, it is because each has its own field of operation, and the former statute does not, in any manner, affect the rights and powers vested under the latter.

3. The question next occurs, what powers and franchises the *Mobile and Montgomery Railroad Company* owned, which, by the act of December 17, 1873, were granted to the *Mobile and Montgomery Railway Company*, when it incorporated under that act?

We have shown that the *Mobile and Montgomery Railroad Company* was formed by the consolidation of the *Mobile and Great Northern Railroad Company* and the *Alabama and Florida Railroad Company of Alabama*. The act under

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which this consolidation and organization took place, gave, granted and confirmed to the Mobile and Montgomery Railroad Company all the rights, privileges, property, franchises and immunities, not inconsistent with those granted by the act, which had been previously given, granted and confirmed to the Mobile and Great Northern Railroad Company and the Alabama and Florida Railroad Company of Alabama. The Mobile and Montgomery Railroad Company, then, owned and possessed all the powers and franchises which belonged to both said companies, by the consolidation of which it was organized.

It is therefore evident, from an inspection of the charters of the two corporations forming the consolidated corporation, that the Mobile and Montgomery Railroad Company, up to the time of the passage of the act authorizing the Governor to endorse its bonds, owned and possessed the same powers to levy and collect tolls, which each of said consolidated roads owned and possessed.

To what extent were these powers modified by said act authorizing the Governor to endorse said bonds? By the terms of said act, the endorsement of these bonds was on condition that on and after the time fixed for the completion of said railroad from Tensas to Mobile, the Mobile and Montgomery Railroad Company shall transport passengers and freight at the same rates as provided for other roads in the general bill, passed at the same session, to furnish the aid and credit of the State to expedite the construction of railroads. It must be noted, there is no *grant* of power, in this act, to levy and collect tolls. That power had been granted by the act of consolidation. This act was accepted by the Mobile and Montgomery Railroad Company, and this condition operated *only* as a limitation, by agreement, upon the exercise of the previously granted power to levy and collect tolls. It was not a surrender of the power which had been previously granted—otherwise, there should have been another grant of power.

This agreed limitation was not transmitted by the act authorizing purchasers to incorporate, to the Mobile and Montgomery Railway Company. The Mobile and Montgomery Railway Company was a new, distinct and independent corporation. It took everything by creation and grant, and acquired nothing by mere transmission. By the act, under which it became a corporation, the powers and franchises which were granted, were ascertained by *reference* to the powers and franchises that belonged to the company

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originally owning the railroad, and which had the same legal result as if those powers and franchises had been specifically set out in the act.—*Shields v. Ohio*, 5 Otto, 319, 323.

In the act authorizing the Governor to endorse the bonds of the Mobile and Montgomery Railroad Company, there is no *express* authority, or requirement to execute a mortgage to secure the bonds. This is inferred or implied from the language of the act; such as “the first mortgage bonds of the said railroad company.”

The contract, evidenced by the act, was not consummated until the execution of the mortgage, and the performance of all the terms required by the act. Until all this was done, the limitation upon the exercise of the power to levy and collect tolls did not become effective. By this mortgage, all the *franchises, tolls, issues and profits*, in addition to other property, were conveyed. What franchises were these? Certainly, those franchises which the Mobile and Montgomery Railroad Company owned and possessed previous to, at the time and independent of the act authorizing the Governor to endorse its bonds. They were its franchises, unincumbered by the limitations and conditions of that act.

The contract between the State and the Mobile and Montgomery Railroad Company, as set out in the act authorizing the Governor to endorse its bonds, was *personal* to each of the parties and bound them alone. The corporators of the Mobile and Montgomery Railway Company were holders of these bonds, to secure which mortgage was executed. By the sale of the railroad and other property, under the decree of said Chancery Court, said bonds were fully paid, and the State discharged from all liability on account of its endorsements thereon. The contract between the State and the Mobile and Montgomery Railroad Company was fully performed, executed, satisfied and discharged. Nothing of it, whatever, remained, and the Mobile and Montgomery Railroad Company virtually and practically, passed out of existence as a corporation. The Mobile and Montgomery Railway Company never received, or succeeded, as party or privy, to any of the benefits of said contract, and did not, and could not have succeeded to any of its burdens. Hence, the power and franchises granted to the Mobile and Montgomery Railway Company, by the act authorizing purchasers to incorporate, were the powers and franchises which belonged to the Mobile and Montgomery Railroad Company, unaffected by the terms and conditions of the act authorizing the Governor to endorse the bonds of the latter.

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4. But, even if we are mistaken in this last position, and the powers and franchises of the Mobile and Montgomery Railway Company *are* encumbered and restricted by the limitation and condition provided by the eighth section of said act, still, we insist that the Mobile and Montgomery Railway Company is not subject to the provisions of the act of April 19th, 1873, under which this suit was brought, and that it is constitutionally protected against said act. It is clear that the legislature had no constitutional power to put said limitation and condition upon the Mobile and Montgomery Railroad Company without its consent. If it is a limitation upon the franchise, it was made by agreement, and was a condition to, or modification of a contract previously existing, viz: the charter of the company. Neither party to this contract could change or modify this limitation, condition or modification in any respect whatever, without the consent of the other party to the contract. The legislature, therefore, did not have the power to pass an act which changed or modified this condition or modification. It had no power to change *it*, to which no penalties were attached, by giving the right to charge higher rates of freight, to which heavy penalties are attached. The agreement or consent to limit, alter or modify, is the boundary of the legislative power—thus far it can go and no farther. It follows that the legislature had no power to subject even the Mobile and Montgomery Railroad Company to the provisions of the act of April 19th, 1873. Such an act impaired the obligation of the contract, and was violative of the Constitution of the United States.—6 Howard, 301–27; 4 Wallace, 535.

The annexing of heavy penalties, as is done by the act of April 19th, 1873, as effectually diminishes the value of the contract and impairs its obligation as any other legislation could do. It is imposing conditions not expressed in the contract.

It requires no argument to show that, without reference to any penalties, an act, the probable and natural effect of which is to compel the railroad company to charge such high rates for the transportation of freight over the whole line of its road as to destroy that branch of its business, or, else to carry local freight, in many instances, at less than the cost of transportation, which is the effect of the act of April 19th, 1873, as construed by this court, *does* diminish the value of the contract and impairs its obligation.

5. Neither in the charter of the Alabama and Florida Railroad Company, nor of the Mobile and Great Northern

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Railroad Company, nor of the Mobile and Montgomery Railroad Company, nor in the act authorizing the Governor to endorse the bonds of the last company, is any right reserved to alter or amend in any respect whatever. But if there had been, this would not have affected the rights of the Mobile and Montgomery Railway Company, which was incorporated under an act passed subsequently to the act of April 19th, 1873.

This principle, as we understand it, has been clearly and explicitly decided in a late case by the Supreme Court of the United States, in the case of *New Jersey v. Yard*, 5 Otto, 104-113.

Upon the principle settled in that case, although the legislature may in the original charter and the first supplement thereto reserve the right to alter or amend; yet if a second supplement is enacted in which the right is not reserved, and which has the elements of a contract, the legislature has no power to alter or amend it. How much stronger is the case, when the corporation sought to be effected is a new and distinct corporation, with an original grant of powers? It follows that, if the legislature, in the act authorizing the Governor to endorse the bonds of the Mobile and Montgomery Railroad Company, had expressly reserved the right to alter or amend, this would not have been a reservation of a right to alter or amend the charter granted to the Mobile and Montgomery Railway Company by the act authorizing purchasers to incorporate.

It follows, further, that the imposition, by the legislature, in the act authorizing the Governor to endorse the bonds of the Mobile and Montgomery Railroad Company, of the condition therein expressed as to the charge for the transportation of local freight, and its acceptance by the company, did not give the right to the legislature to alter or amend, or impose other conditions; for, as was said in *New Jersey v. Yard*, *supra*, "it is not easy to see why such a provision should be extended beyond the terms in which it is expressed; and all the force which properly belongs to it is given, when the exemption from the constitutional provision against impairing the obligation of contracts, is extended as far as the language of the exemption justifies, and it should be extended no further by implication."

Much less would it be the reservation of a right to alter or amend the charter subsequently granted to the Mobile and Montgomery Railway Company, under a subsequent and distinct grant of powers in which no such right is reserved.

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It is insisted, however, that the case of *Shields v. Ohio*, 5 Otto, *supra*, militates against the views above presented, but a careful examination of that case will show to the contrary.

It is further insisted that the regulation of charges for the transportation of freight and passengers on railroads, by the legislature, is a part of the police power of the State which the legislature can not alienate. It is difficult to see why the legislature can alienate the power to tax, which is the highest attribute of sovereignty, yet can not alienate the power to regulate the tolls on railroads. But on this point we are content to quote from Cooley on Const. Lim. 2d ed. marginal, p. 577: "The limit to the exercise of the police power in these cases must be this: the regulations must have reference to the comfort, safety, or welfare of society; they must not be in conflict with any of the provisions of the charter; they must not, under pretense of regulation, take from the corporation any of the essential rights and privileges which the charter confers. In short, they must be police regulations in fact, and not amendments of the charter in curtailment of the corporate franchise."

6. The provision of article xiii. § 1, of the constitution of 1868, does not affect the question. It simply provides that all general laws passed, pursuant to that section, may be altered, amended or repealed. This clearly contemplates legislative action *subsequent* to the passage of the general laws. There has been no *subsequent* legislative action relating to the act under which the Mobile and Montgomery Railway Company was incorporated. The act of April 19th, 1873, was prior thereto, and, therefore, the constitutional provision has no application. Where the charter reserved to the legislature the right of modification after the corporators had been reimbursed their expenses in constructing a bridge, with twelve per cent. interest, an amendment before such reimbursement, requiring the construction of a certain bridge, was held unconstitutional and void.—*Washington Bridge Co. v. State*, 18 Conn. 53. Even if the constitutional provision did apply, the repeal or modification of a general law, under which rights have vested, can not defeat such vested rights.

We think we have established the following propositions: That the Mobile and Montgomery Railway Company was vested with all, or some of the following powers:

Either, 1st. To establish such rates of tolls as its directory shall from time to time deem proper; or,

2d. To lay and collect tolls, the amount of which are re-

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stricted only by the provision that the net profits of the road shall not exceed twenty-five per cent. per annum; or,

3d. Both, or one of the foregoing powers, the exercise thereof limited by the agreement not to charge more than twenty-five per cent. higher rates for the transportation of local freight, than it will for carrying through freight, without any penalties thereto attached.

We think we have also established that a provision in a general law that a railroad company may, for the transportation of local freight, demand and receive not exceeding fifty per cent. more than the rate charged for the transportation of the same description of freight over the whole line of its road, is inconsistent with the due and proper exercise of either of the foregoing powers.

When, however, the power of alteration and amendment is reserved, it is not without limit. "The alterations must be reasonable; they must be made in good faith, and consistent with the scope and object of the act of incorporation. Sheer oppression and wrong can not be inflicted under the guise of amendment and alteration. Beyond the sphere of the reserved powers, the vested rights of property of corporations, in such cases, are surrounded by the same sanctions and are as inviolable as in other cases."—*Shields v. Ohio*, 5 Otto, 324.

The effect and consequence of the second section of the act of April 19th, 1873, if continued and enforced, are too palpable to require discussion. The result will be the destruction of the railroad interest in Alabama. It is unreasonable and oppressive, and therefore void, if for no other reason.

7. On March 17th, 1875, Acts 1874-5, page 243, the legislature passed an act which provided that any officer, manager, or agent of any railroad company, lessee, association, or corporation, managing or operating any railroad in this State, who violates the provisions of the act of April 19th, 1873, shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not less than one nor more than five hundred dollars for each offense. It will be seen by comparison, that the persons mentioned in this act are the same as those mentioned in the first section of the act of April 19th, 1873. It is, therefore, evident that the legislature intended to subject to punishment by indictment for a violation of the provisions of the act of April 19th, 1873, the same persons who are mentioned in the first section of that act, and this includes corporations managing and operating

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railroads in this State. That an indictment will lie against a corporation is established.—*Owsley v. Montgomery and West Point R. R. Co.*, 37 Ala. 560; Ang. & Ames on Corp. § 394; *Commonwealth v. New Bedford Bridge*, 2 Gray, 339; *State v. Vermont R. R. Co.*, 27 Vermont, 103; *State v. Morris and Essex R. R. Co.*, 23 N. J. L. 360. The act of March 17th, 1875, covering every offense found in the act of April 19th, 1873, and prescribing a new and different penalty, recoverable by indictment, is plainly repugnant to the act of April 19th, 1873, and repeals it so far as relates to the penalties.—*Norris v. Crocker*, 13 How. 429, 438; *Nichols v. Squire*, 5 Pick. 168. The act of April 19th, 1873, so far as relates to the penalties, was, therefore, repealed at the time this suit was commenced.

8. In discussing what is meant by the words in the statute of April 19th, 1873, “for the transportation of the same description of freight over the whole line of its road,” the counsel for appellee use the words “through freights” as if those words were used in the act. They are found only in the general law of February 21st, 1870, and the evidence shows that they have a technical meaning among railroad men, and as applied to the defendant embrace only freights coming over other roads and passing over the whole or a part of its road. Such freights may or may not pass over the whole line of its road. These words having obtained a fixed and definite meaning, it is to be inferred that they were used in that sense. In the second section of the act of April 19th, 1873, different words were used—“over the whole line of its road”—and the conclusion is, that the legislature intended something different from what is meant by the words used in the former general law. These last words mean freight shipped at or from one terminus of the road to the other. Hence the rate charged for *through freight* is not the basis fixed for the rate to be charged for the transportation of local freight by the act of April 19th, 1873.

The legislature, in that act, used the terms “local freight” and “freight over the whole line of its road” as correlative terms; by “local freight” was meant freight shipped from either terminus to a way station, or *vice versa*, or from one way station to another, that is over a part of the road only. And “freight over the whole line of its road,” means as the correlative, freight shipped at and from one terminus to the other. The intention of the legislature was to fix the minimum limit of discrimination against persons who had to ship to and from way stations in favor of persons who shipped at

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and from one terminus to the other; and the rate for the transportation of *through freights* as the basis upon which to fix the rate for the transportation of local freight was abandoned in the act of April 19th, 1873, with the view of leaving the railroad companies free from all restrictions and limitations as to competing for through freights at the terminal point of shipment with other roads running through other States, thus increasing the business, advancing the interests, and enhancing the prosperity of the State.

WATTS & SONS, with whom was L. D. BROOKS, *contra*.
1. Was the appellant bound by and amenable to the law of the 19th April, 1873? The facts in the record show that the defendant bought all the rights which the Mobile and Montgomery *Railroad* Company had at the time its road was sold under a decree of the Chancery Court of Montgomery.

It is certain that the appellant was and is a railroad company in this State, and it is certain that it is liable to the penalties imposed by the statute, unless there is something in its charter which forbids the legislature from regulating its rates of charges for the transportation of goods.

The appellant organized itself into a corporation, under the law of 17th December, 1873, (see acts of 1873, pp. 56 and 57.)

It is scarcely necessary to remark that the words, "the powers and franchises which belonged to the company or corporation originally owning the railroad so purchased," as used in that act, only mean such powers and franchises belonging to the company whose road is sold, at the time of the sale or decree of sale.

The question then is narrowed down to this: What powers and franchises did the Mobile and Montgomery *Railroad* Company possess at the time its road was sold under the decree of the Chancery Court? Whatever rights, powers, franchises and immunities it possessed, the defendant succeeded to. It then stands in the shoes of the Mobile and Montgomery *Railroad* Company. If the legislature had the right, on the 19th of April, 1873, to regulate its rates of freight, then, to the same extent, the appellant is bound by any law passed by the legislature. And especially is this so, as the appellant was organized after the passage of the law of the 19th April, 1873.

We must then inquire what right the legislature had, on the 19th of April, 1873, to regulate the rates of freight of the Mobile and Montgomery *Railroad* Company?

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It is unnecessary to discuss the question how far the legislature had the power to regulate the rates of freight of railroad companies generally. And it is equally unnecessary to inquire whether such power could have been exercised by the legislature under the original charters of the Mobile and Montgomery Railroad Company. We need only inquire the *status* of the consolidated corporation at the time of the sale.

After the consolidation, the Mobile and Montgomery Railroad Company applied to the legislature to obtain an endorsement of its bonds; and the legislature passed an act authorizing the Governor of the State to endorse its bonds to the extent of \$2,500,000. One of the conditions of this endorsement was that the Mobile and Montgomery Railroad Company, after the time fixed for the completion of the road from Tensas to Mobile, viz., July 1st, 1872, shall transport passengers and freight at the same rates provided for other railroad companies in the general bill passed at the same session of the legislature to furnish aid and credit of the State to expedite the construction of railroads.

The general bill referred to provides: "That as a condition on which the aid is granted by this act, the several railroad companies *shall not charge* more than four (4) cents per mile for each passenger traveling over their lines, and shall not charge more than twenty-five (25) per cent. higher rates for carrying local freight than they will for carrying through freight, nor shall they discriminate unfavorably against any citizen of Alabama, in respect to any of the benefits or privileges of their roads."

2. The Mobile and Montgomery Railroad Company accepted the endorsement of its bonds on the conditions prescribed in the act authorizing the endorsement, and completed the road from Tensas to Mobile before the passage of the act of April 19th, 1873. Thereby the company placed itself under the same control and power of the legislature as to freight and passengers that the State could exercise over any company receiving the aid of the State.—See *Mon. Navigation Co. v. Coon*, 6 Penn. St. 382; 7 Greenleaf Rep. 470; Gray, 234.

It is clear that under the terms of the law above quoted, the legislature had the right to regulate the rates of freight *above* those prescribed in the act of February 21st, 1870. By the terms of the 15th section of the act, the Mobile and Montgomery Railroad Company, after accepting the provisions of that act, had no right to charge more than twenty-five per cent. on local freight over through freight. To

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charge more would not only violate its contract with the State (which thereby became a part of its charter), but would violate a general law of the State, unless the legislature by some act authorized an increase of the rates. The legislature, without the consent of this company, could not require it to transport local freight for *less* than twenty-five per cent. above the rates of *through* freight. By the terms of this contract and law, the rates of *through* freights were left *unrestricted*, except so far as that it could not discriminate against the citizens of this State and connecting roads. The company could charge, subject to the foregoing restrictions, any rate of through freights. The only restriction was on its right to charge more than twenty-five per cent. excess on *local* freight over *through* freight. It will scarcely be contended that the legislature can not impose a penalty on any body or corporation for the violation of a law which that body or corporation is bound to obey. The power of the legislature is plenary, except in so far as it is restricted by its own or the Federal constitution.—*Dorman v. The State*, 34 Ala.; *Gowen v. Penobscott R. R. Co.*, 44 Maine, 135.

The right of the legislature to punish for the violation of law, has not been restricted by its contract with this company; neither, indeed, could the legislature deprive itself of such right, if it would.

Now the legislature, by the act of the 19th of April, 1873, has granted to all railroad companies under its control the right to charge fifty per cent. excess on *local* freights over and above the rate it may charge on *through* freights; and it imposes a penalty for the violation of this law. In the same act the right to charge a higher rate for the transportation of passengers than that allowed by the law of the 21st February, 1870, is given.

By the law of the 21st of February, 1870, and by the act of the 25th of February, 1870, the Mobile and Montgomery Railroad Company, as well as every railroad company in the State, which received aid and credit of the State, placed itself under the power of the legislature to regulate its rates of *local* freights *above* the limits prescribed in the law. The law of the 19th of April, 1873, was then strictly within the limits of legislative power. In passing it the legislature violated no contract with the Mobile and Montgomery Railroad Company, because that company had voluntarily, and as a condition upon which it obtained the endorsement of its bonds, placed itself under the power of the State to that extent.

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After this company received the endorsement of its bonds, under the law of the 25th of February, 1870, the State could pass any general law governing it, within the scope of legislative powers as to rates of freight, provided the rates prescribed should not be lower than those prescribed in the law of the 21st February, 1870, and the company's assent to such a law would be no more necessary to its validity than its assent to any other general law of the State. To make a law binding on the citizens generally, it is not necessary to have the consent of the citizens to its passage, except such consent as is implied by the passage by the legislature of a constitutional law.

3. If the defendant stands in the shoes of the Mobile and Montgomery Railroad Company, the legislature had the right to regulate its rates of freight for local transportation. If the defendant was a corporation, created under the general law, then this new corporation was subject to the legislature under the constitution of 1868.—See *State v. Maine Central*, 488; see, also, 55 Ohio St. 21.

The constitution prohibits the creation of any *new* corporation, such as this, by special enactment. So that it either follows that the act making this defendant a corporate body is unconstitutional, or else it is subject to the power of the legislature as to its rates of freight.

A corporation can not object to the constitutionality of a law imposing liability, when the statute antedates the creation of the corporation.—*Philadelphia v. Com.*, 52 Penn. St. 451. The power to amend is in the constitution and need not be inserted in the charter.—See *Del. R. R. Co. v. Sharp*, 5 Harr. (Del.) 454; 32 New Jersey Law, 134; 21 N. Y. 9.

It will be observed that the eighth section of the law of the 25th of February, 1870, requires the Mobile and Montgomery Railroad Company to conform to the rates prescribed in the law of the 21st of February, 1870. This is precisely equivalent in legal effect to the incorporation of the 15th section of the law of the 21st of February, 1870, into the law of the 25th of February, 1870.—*Wood v. Hustis*, 17 Wis. 416.

Of course, then, the repeal of the law which gave aid and credit to the railroads could have no effect on the law of the 25th of February, 1870.—*Wood v. Hustis*, 17 Wis. 416. The repeal had only the effect to prevent the aid and credit provided for by it, to be given in the future. The repeal could not affect the rights of any person which had vested whilst the law was in force and unrepealed.—See *Wood v.*

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Hustis, 17 Wis. 416; *Crosby v. Smith*, 19 Wis. 453; *Sika v. C. & N. W. R. R. Co.*, 21 Wis. 370.

4. Has the law of the 19th of April, 1873, been repealed?

It is said that it was repealed by the law of the 19th of March, 1875. This law simply repeals the law of the 21st of February, 1870, which gave aid to railroad companies.

The repeal did not and could not affect the rights of any company to the endorsement of bonds made before the repeal. The law of the 25th of February, 1870, was not repealed by it. The law of the 25th of February, 1870, incorporates the 15th section of the law of the 21st of February, 1870; but the repeal of the law of the 21st of February, 1870, could not, and it was not intended, to repeal the law of the 25th of February, 1870.

But it is argued by the counsel for appellant, that the act of March 17, 1875, "to prevent excessive charges by railroad companies," repeals the act of the 19th of April, 1873. It will be observed that this act does not, either in its title or its body, purport to *repeal* the act of the 19th of April, 1873. If it repeals it at all, it must be because it is in irreconcilable conflict with and repugnant to it.

It will be observed that this act of the 17th March, 1875, makes any officer, manager or agent of, &c., &c., managing or operating any railroad in this State *who violates, &c., liable to indictment and fine.* It does not undertake to make any railroad *company*, lessee, association, or corporation liable to indictment, but only imposes the penalty *on*, and applies only *to*, the *officer*, manager or agent of such railroad company, lessee, association or corporation. The argument is made that the railroad company, because it is a corporation, is liable to indictment, and that therefore the act is as broad, and covers the same persons and things, as the act of the 19th of April, 1873.

But it is quite clear, if the legislature had intended to make the railroad company itself indictable, as well as the officer, manager or agent, the language of the act would have been quite different, and would have left no room for doubtful construction.

According to the argument of appellant's counsel, the statute does not make liable to indictment the officer, manager or agent of the lessee, association or corporation; but it makes liable the lessee, the association and corporation, and not the officer, manager or agent of either.

5. The question is narrowed down to this: Under the law of

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the 17th of March, 1875, can a *railroad company* be indicted? Suppose a railroad company to be indicted under this statute, and the indictment demurred to; what would be the argument? It could be justly said the law is a penal statute, and must be construed strictly. It is the officer, manager or agent of the *railroad company* who, by the express terms of the statute, is made indictable, and it is nowhere said that the *railroad company itself* is made indictable.

If a railroad company is not liable to indictment under it, then it is clear that there can be no irreconcilable repugnance between it and the act of the 19th of April, 1873.

But if the railroad company was liable to indictment under it, still there is no irreconcilable repugnancy between the two. The two acts are not so repugnant but that they can both stand. There is a clear field of operation for both.

The act of April 19th, 1873, provides a remedy for the party injured by the violation of its provisions by any railroad company, and makes it liable to him in double the amount of the illegal charges, but in no case less than twenty dollars. The one statute gives a civil remedy for his injury to the party injured; the other provides a remedy to the public wrong by means of an indictment. The latter one provides a cumulative remedy for the violation of the provisions of the act of April 19th, 1873.—See *Smith's Com.* § 759; *Potter's Dwaris*, 156-7; *Bush v. Republic*, 1 Texas.

Repeals by implication are not favored, and this rule must be more stringent, since the constitution requires the title to express clearly the subject of each law. It is clear that there was no intention to repeal. There is none expressed, and there is no irreconcilable repugnancy between the provisions of the two.—See *Iverson v. The State*, 52 Ala. 170; *Gohen v. Texas & P.*, 2 Woods C. C. (Rep.) 346; *Pacific R. R. Co. v. Cass Co.*, 53 Mo. 17.

To hold then that the law of the 17th of March, 1875, repeals the act of the 19th of April, 1873, is to hold that the former violates the constitution. The "title" of this act is "to prevent excessive charges by railroad companies." This act is wholly unconstitutional, because its "title" does not clearly express the "subject" of it. Who would suppose, from reading such a "title," that the body of the act made is a misdemeanor in the agent, officer or manager of a railroad company to violate the statute of the 19th of April, 1863?

Who would suppose, from such title, that a "lessee or an

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association," operating or managing a railroad in this State, who violated the provisions of the law of the 19th of April, 1873, should be subject to the indictment and fine? Who would suppose, from reading such a title, that a "railroad company" managing or operating a railroad in this State is, in the body of the act, made liable to indictment for violating the provisions of the act of the 19th of April, 1873?

6. In order to determine whether some of the testimony as to distance from New Orleans to Montgomery, and from New York and other places to Montgomery, was correctly admitted, it is necessary to inquire what is meant in the laws of the 21st and 25th of February, 1870, and 19th of April, 1873, by the terms rates of "local freights" and rates of "through freights." When we look at these different laws, and think of the purposes to be accomplished by the restriction, it must be obvious that by "local freights" are meant such freights as are charged for the transportation of goods for any distance on the road less than its whole length; and by *rates of through freight* are meant the rates charged for the transportation of goods over the whole line of its road from one terminus to the other. If goods were shipped from Atlanta to Mobile, and transported over the line of defendant's road to Mobile, the rates charged for such transportation by the defendant could be nothing else than for through freight. They certainly would not be rates for "*local freights*." There are no other rates named in the laws but *local* and *through* rates.

When the legislature imposed the penalty for charging on local freights more than fifty per cent. over the rates charged for through freights, the language could not be mistaken or misunderstood. The language of the law leaves no room for doubt. It is this: When it describes what is meant by through freight, the language is, "the *rate* charged for the transportation of the same description of freight over the whole line of its road." What is meant by *through* freight, as contradistinguished from "local" freight, is thus defined by the statute itself. That which is within the letter of the law must likewise be within its spirit, unless there is something in the context or surrounding circumstances—something in the evil sought to be remedied—which shows clearly that that which is within the letter, is not within the spirit of the law. "It is not true that the courts, in the exposition of penal statutes, are to narrow the construction. We are to look to the words in the first instance, and when they are plain we are to decide on them. If they are doubtful,

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we are *then* to have recourse to the subject matter; but at all events it is only a secondary rule.”—See Bacon’s Ab. 9, 253. “It is the duty of judges to put such construction upon a statute as may redress the mischief, guard against all subtle inventions and evasions for the continuance of the mischief *pro privato commodo*, and give life and strength to the remedy *pro bono publico* according to the true intent of the makers of the law.”—See Bacon’s Ab. 9, 251–52. What was the mischief intended to be remedied? The excessive and extortionate charges, for *local* freights, made by railroad companies, on persons who shipped freight to be transported over a portion of the lines of railroad less than “the whole line of the road.”

Any testimony which tended to show what were the rates of through freights was competent; for under the law, only fifty per cent. above them was allowed to be charged on “local freights.” In order, then, to show what was charged by the defendant for through freight, it was competent to prove what charge for freight was made for goods transported from Atlanta, or New Orleans, or New York, or St. Louis, over the whole line of defendant’s road. It was also competent to show the distances from New York, or New Orleans, to Montgomery, because the defendant, under the law, and by its agreement, shown in the evidence, *pro-rated* with connecting roads according to the distances. The ninth section of the act of February 21, 1870, requires the defendant to *pro-rate* with connecting roads and to make no discriminations, etc.—*State, ex rel. Harrell, v. M. & M. Railway Co.*, 59 Ala.

7. The penalty does not depend at all on whether the shippers of the goods paid voluntarily or *involuntarily* the illegal charges. The defendant shall not *demand* and *receive* for the transportation of “local freights” exceeding fifty per cent. more than the *rate* charged for the transportation of the same description of freight “over the whole line of its road.” The violation of the law consists in *demanding* and *receiving* the illegal charges, whether paid voluntarily or involuntarily.

And a recovery, under the count for money had and received, for the overcharges, depends as little on the question whether charges were paid with or without protest, whether voluntarily or involuntarily.—See 1 Redf. on Railways, subdivisions 2 and 3, § 124, pp. 447–8; 2 Greenleaf on Ev. § 121, and authorities cited in note 5; *Parker v. Great Western R. R. Co.*, 7 Man. & G. 292, where the whole subject is

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discussed; *Chandler v. Sanger*, 114 Mass. 364; *Town Council v. Burnett*, 34 Ala. 156; *Carew v. Rutherford*, 106 Mass. 1.

Although it is a general rule that money paid voluntarily with full knowledge of the facts, can not be recovered back in an action for money had and received, yet it is equally well settled that money is not *voluntarily* paid when it is paid to any one having, at the time, the power to enforce his demands, such as a tax-collector, or to a bailor by a bailee, in order to get possession of the goods, or where it is paid under an illegal exaction of tolls, or freights, or taxes. And it is not necessary to make *protest* in such cases, at the time of payment, unless where an agent is sued, and then the protest is necessary to enable the agent to retain the money as against his principal.—*Harmony v. Bingham*, 2 Kernan, 93; *Colwell v. Peden*, 3 Watts, 328; 2 Greenl. Ev. 121, and note 5, *supra*; 2 Starkie Ev. on p. 85, and notes; 1 Redf. on Railways, § 124, *supra*; *Baker v. City of Cincinnati*, 11 Ohio St. 536; *Parker v. Great Western R. R. Co.*, 7 M. & G. 253, *supra*; *Barton & S. G. Co. v. City of Boston*, 4 Metc. 187; *Stephan v. Daniels*, 27 Ohio St. 527; *Howe v. State*, 53 Miss. 66; *McKee v. Campbell*, 27 Mich. 497.

No protest is necessary in such a case.—See *Conrad v. Zeff*, 26 Mich. 118; *First Nat. B'k v. Watkins*, 21 Mich. 483.

The *Lafayette & Ind. R. R. Co. v. Patterson*, 41 Indiana Rep. 312–329, 330, is directly in point as to the right to recover back the illegal freights.—See, also, the case of *C. & A. R. R. Co. v. Coal Co.*, 79 Ill. on p. 121, which in principle is precisely like the case at bar.—See, also, *Potomac Coal Co. v. Cumberland & Pa. R. R. Co.*, 38 Md. 226; *Tuttle v. Everett*, 51 Miss. 27.

Whenever a person is compelled to pay to a public officer, in order to induce him to do his duty, fees to which by law he is not entitled, they may be recovered back.—*Robinson v. Ezzell*, 72 N. C. 231; see, also, *Briggs v. Boyd*, 56 N. Y. 292.

It was asserted in the argument by the counsel for appellant, that inasmuch as the statute creates a remedy for the party injured, he can have no other remedy, and that he can not recover for the excessive overcharges under the common counts. Whenever illegal overcharges are demanded and received, by any person having the power to coerce the payment (as defined in the authorities herein cited), the person thus receiving the illegal excess, in the eye of the law holds that much money which *ex equo et bono* belongs to the party paying; and according to the well settled, yet plastic prin-

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ciples of the common law, a suit for money had and received may be maintained by the injured party to recover of the wrong-doer.—*Fuller v. The Chicago & N. W. R. R. Co.*, 31 Iowa; *Parker v. G. W. R. R. Co.*, 7 M. & G.

In this, and most of the States, the railroad companies have great and exclusive privileges. They have the right to use another's real estate without his consent, and, owing to the public benefit supposed to be derived from them, they are allowed rights no private citizen could have conferred on him by legislative power.—See *Tuscumbia C. & D. R. R. Co. v. Aldridge*, 2 S. & P. 139; *Daughdrill v. Ins. Co.*, 31 Ala.

The Mobile and Montgomery Railroad Company, in whose shoes defendant, the Mobile and Montgomery Railway Company, stands, asked of the legislature a favor, and the legislature imposed a condition on the grant of that favor, and this condition thus became a part of its charter whenever it accepted the favor; and it was as binding on the company as if it had been originally a part of the charter.—See *Mobile and Ohio Railroad Co. v. State*, 29 Ala. 573.

STONE, J.—In the case of the *State, ex rel. Harrell, v. The Mobile and Montgomery Railway Company*, 59 Ala. 321, we construed, in part, the act "regulating the charges for transportation of freight upon railroads within this State," approved April 19th, 1873, Pamph. Acts, 62. In that statute it is declared, "that all railroad companies in the State . . . may, for the transportation of local freight demand and receive not exceeding fifty per cent. more than the rate charged for the transportation of the same description of freight over the whole line of its road." In the case referred to, it is said, "we can not assent to the argument that the fifty per cent. additional, which the statute allows the corporation to charge for transportation of local freight, means fifty per cent. on the charge over the whole line of the railroad, irrespective of the distance the local freight may be carried. The language of the statute forbids that construction. "Fifty per cent. more than the rate charged . . . over the whole line of its road," are the words of the statute. Rate is the emphatic word of the sentence. In this connection it is employed in the sense of proportion,—a standard of valuation; a rule or measure of assessment. That is, an assessment according to a given standard. The charge for transportation over the whole line is so much, which is equivalent to so much per mile. Local freight

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must be carried at the same rate, *plus* fifty per cent. Thus, if the charge over the whole line be 100, the charge over half the line will be 50, *plus* 50 per cent.—25-100; equal to 75-100, the true result.” It is contended for appellant that the word rate, in the statute quoted, was employed to express the class or quality of the freight over the whole line of the road, by whose tariff the legislature intended to graduate the tolls for local freights; and that the permitted charges for transporting local freight, no matter how short the distance, might be raised to a sum which will be equal to fifty per cent. increase on the charge for the same class of freight over the whole line of the road. This would not only give to the word a strained interpretation, but would render it meaningless, superfluous and unnecessary. Another clause in the statute expresses that idea in language so plain, that it can not be misunderstood. “The rate charged for the transportation of the *same description* of freight,” is the language of the law. This is the declared standard by which the legislature intended railroads should be governed in adjusting their tariffs of local freights. We adhere to our former construction of this statute.

It is contended for appellant that the Mobile and Montgomery Railway Company is not bound by the statute above considered. The Mobile and Montgomery Railway Company is the successor of the Mobile and Montgomery Railroad Company, which was formed by the consolidation of two other incorporated railroad companies, and had conferred upon it the powers, privileges, immunities and franchises of each of said original corporations. Those original companies, and the Mobile and Montgomery Railroad Company had unlimited power and discretion in the matter of levying tolls and charges. They were organized under special charters granted to each. Under the act “to authorize the Governor of the State of Alabama to endorse, on the part of the State, the first mortgage bonds of the Mobile and Montgomery R. R. Co.,” approved February 25th 1870—Pamph. Acts, 175—the Governor endorsed the bonds of the said company to the extent of two and a half million of dollars, which bonds were received and used by the company in the repair and completion of its road. The eighth section of this act declares “that the endorsement of the bonds of the Mobile and Montgomery Railroad Company, as herein provided for, is conditioned, that on and after the time fixed for the completion of the said railroad from Tensas to Mobile, the said Mobile and Montgomery Railroad Company shall

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transport passengers and freight at the same rates as provided for other roads in the general bill, passed at the present session, to furnish the aid and credit of the State to expedite the constructions of railroads." The time fixed by said act for the completion of the railroad from Tensas to Mobile, was July 1st, 1872.

Section 15 of the act "to furnish the aid and credit of the State of Alabama for the purpose of expediting the construction of railroads within the State," approved February 21, 1870, Pamph. Acts, 149, enacts "that as a condition on which the aid is granted by this act, the several railroad companies shall not charge more than four (4) cents per mile for each passenger travelling over their lines; and shall not charge more than twenty-five (25) per cent. higher rates for carrying local freight than they will for carrying through freight."

The act "to constitute the purchasers of any railroad hereafter sold under the authority of any law of this State a body corporate and politic," approved December 17, 1873—Pamph. Acts, 56—provides "that in each and every case in which any railroad may hereafter be sold by the State of Alabama, or by any commission, officer or agent of said State, or under any proceeding, judicial or otherwise authorized by law, the purchasers at any such sale may constitute themselves into a body politic and corporate, and shall have and possess all the powers and franchises which belonged to the company or corporation originally owning the railroad so purchased, including the power to purchase and hold real estate and the franchise to be and exist as a corporation under such name as the purchasers may select and adopt," &c. This act was amended March 20th, 1875—see Pamph. Acts, 132—by adding new sections thereto. Sections two and three define, and probably enlarge the meaning of the word purchasers, as found in the before recited act, and contain a *proviso*, "that the rights of any and all persons vested before the taking effect hereof shall not be impaired, or affected thereby." Section four shows clearly that what is meant by constituting themselves a body politic and corporate under the statute amended, is, in effect, a reincorporation, but a reincorporation with "the powers and franchises which belonged to the company or corporation originally owning the railroad." That is, as to ownership of property, and liability for debts and engagements of the former company, it is a new corporation. The franchise, faculties, powers, are but a continuation of the old. These, the new corpora-

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tion succeeds to, precisely as they were surrendered or lost by the defunct corporation. Does the new corporation acquire the franchise and powers, relieved of the restraints and functional disabilities under which the law had rightfully placed its predecessor? Ever since the great case of *Dartmouth College v. Woodward*, 4 Wheat., it has been conceded that, as a rule, the legislature has no power to take away or impair the powers of a private corporation, which have been granted and acted upon. The abridgment of such granted corporate powers, is an impairment of the obligation of the contract of incorporation, as entered into by the legislative grant.—*Cooley's Const. Lim.* 279, and note 2. But when in the precedent law, constitutional or otherwise, power is reserved to revoke, change, or modify the powers granted, the rule is different. Accepting the charter having such condition, is valid and binding on the corporators, and the stipulation becomes a part of the organic law of the corporation. To the extent of the power reserved, the legislature is untrammelled by the charter. And so, this legislative inviolability may be bargained away by the corporation; and when so bargained away for a valuable consideration received, the effect is more than a mere personal contract. It is a modification of the corporate franchise, and to that extent, limits the corporate powers.—*Monongahela Nav. Co. v. Coon*, 6 Penn. St. 379; *Mass. Gen. Hospital v. State Mutual Life Assurance Co.*, 4 Gray, 227, 234; *State v. Maine Cen. R. R. Co.*, 66 Me. 488. Under the undisputed facts in this case, we think the Mobile and Montgomery Railroad Company surrendered its absolute right to fix the rate of tolls for the transportation of passengers and freight, and bound itself not to charge more than four cents per mile for each passenger travelling over its line, and not more than twenty-five per cent. higher rates for carrying local freight than the rate charged for carrying through freight. We think, also, that this limitation on its powers inhered in its organic law, precisely as if it had been incorporated in its original charter. When, then, the purchasers of the railroad, under the act approved December 17th, 1873, constituted themselves a body politic and corporate under the name of the Mobile and Montgomery Railway Company, they acquired the powers and franchises of the former corporation, modified and limited as above expressed.

But before the appellant railway company constituted itself a corporation under the act approved December 17th, 1873, the tariff of tolls fixed by the act approved February 21st,

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1870, was changed by the act approved April 17th, 1873. Pamph. Acts, 62. By the later statute, railroads were permitted to charge five cents per mile, and no more, for transportation of passengers, and "may, for the transportation of local freight demand and receive not exceeding fifty per cent. more than the rate charged for the transportation of the same description of freight over the whole line of its road." This, it will be perceived, is a material increase of the tariff rates fixed by the act of 1870. The record does not positively show that the railway corporation availed itself of this increase of rates, but there is much in the record tending to prove it did. If it were necessary to the decision of this case, we possibly might feel ourselves bound to presume the corporation did adopt this increased tariff of charges, as persons, natural or artificial, generally accept tendered benefits and bounties. Aside from this, however, we hold that when the purchasers acquired the franchise and powers of the Mobile and Montgomery Railroad Company by constituting themselves a body politic and corporate under the name of the Mobile and Montgomery Railway Company, it organized them in the condition they were in before the sale; namely, with the statutory restraint they were under as to charges for transportation of freight and passengers.

It is contended, that while the Mobile and Montgomery Railroad Company may have been bound by the limitations on its power to charge for transportation of local freight under the eighth section of the act approved February 25th, 1870, copied above, this did not authorize the imposition of the penalties declared in the act of April 19th, 1873; and that, to the extent of those penalties, the later statute impairs the obligation of the contract. There are several answers to this objection. First, it took away no chartered right of the company. It only provided a penalty for the violation, by the corporation, of its duty, as declared by the law under which it existed, and exercised its corporate powers. It had no authority to violate this law; and hence, the statute neither weakened nor impaired any power granted to the corporation. Second, the act which imposed the penalties, conferred on the railroad the right or privilege of increasing materially, and beneficially to itself, its tariff of tolls for transportation of passengers and local freight. We probably might presume this grant was made at the request of the railroad corporations affected by it; and, as intimated above, that the railroad accepted the grant, by availing itself of the privilege the law tendered to it, by increasing its rate

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of charges as therein authorized. But, third, if the corporation did act under the statute, by increasing its tolls up to the standard therein authorized, then it accepted the statute, and can not be heard to renounce its burdens, while claiming and enjoying its benefits. Fourth, the corporation being bound to transport local freight at a rate not exceeding twenty-five per cent. above its tariff of charges on through freight, the legislature had authority to compel the observance of this duty, by the imposition of penalties for its violation. Such impositions of penalties does not impair the obligation of the contract. The statutes fixing the rate of charges for transportation of passengers and local freight, furnish evidence that the legislature felt it to be its duty to erect this barrier against the power of the corporation to oppress the public. If the rates on local freights, carried short distances, are fixed too low, the remedy is not with us.

Another reason may be urged why the present appellant is bound by the statutes above, which fix the rate of railroad charges. It was incorporated, as we have shown, after we came under the dominion of the constitution of 1868. By section one, article thirteen, of that constitution, it is ordained that "corporations may be formed under general laws, but shall not be created by special act, except for municipal purposes. All general laws and special acts passed pursuant to this section, may be altered, amended or repealed." The last sentence of the section above quoted, with the first somewhat modified, is retained in the constitution of 1875, section one, article fourteen. We hold that the Circuit Court did not err in holding the appellant amenable to the statutes fixing a maximum tariff of rates for transportation of freight.

We have shown above that any demand and payment of charges for transportation of local freight, above fifty per cent. increase on the rate of the same description of freight over the whole line of the railroad, is excessive and illegal. It is in positive disregard and violation of the mandate of the law. It is contended for appellant, first, that inasmuch as the statute has declared the rate of tolls, and has given a penalty for its violation, this remedy is exclusive, and none other can be resorted to. Second, that the payments were voluntarily made, and therefore can not be recovered back. We do not think there is any thing in either of these objections. In regard to the first, any violation of a statute, or disregard of a statutory duty, by which another suffers pecuniary loss, gives to the injured party a right of action for the damages sustained.—*Satterfield, Ex'r. of Grey, v.*

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Mobile Trade Co., 55 Ala. 387. And where the wrong consists in the unauthorized demand of money, and its payment under such unauthorized demand, this is money had and received by the demandant for the use and benefit of the payor, unless the case falls within the principle of money voluntarily paid; and a count for money had and received is sufficient for its recovery. The second objection. Railroads have so expedited and cheapened travel and transportation; have so driven from their domain all competing modes of transportation, that the public is left no discretion but to employ them, or suffer irreparable injury in this age of steam and electricity. They have their established rates of charges, and these the shipper must pay, or forego their facilities and benefits. To object or protest would be an idle waste of words. The law looks to the substance of things, and does not require useless forms or ceremonies. The corporation and the shipper are in no sense on equal terms, and money thus paid to obtain a necessary service, is not voluntarily paid, as the law interprets that phrase. In the case of the *Chicago and Alton Railroad Co. v. the C., V. & W. Coal Co.*, 79 Ill. 121, the court, in reply to the objection that the money was voluntarily paid, said: "It can hardly be said these enhanced charges were voluntarily paid by appellees. It was a case of life or death with them, as they had no other means of conveying their coals to the markets offered by the Illinois Central, and were bound to accede to any terms appellants might impose. They were under a sort of moral duress, by submitting to which appellants have received money from them which in equity and good conscience they ought not to retain." The case of *Parker v. Gr. Wes. R. R. Co.*, 7 Man. & Gr. 253, was a suit by a shipper to recover back excessive charges paid the railroad. It was objected that the payment was voluntary. The court, C. J. TINDALL, said: "We are of opinion that the payments were not voluntary. They were made in order to induce the company to do that which they were bound to do without them; and for the refusal to do which an action on the case might have been maintained." The case was assumpsit for money had and received, and the court ruled that the action was well brought. To the same effect are the following authorities: 2 Greenl. Ev. § 121; *Caldwell v. Pedin*, 3 Watts, 327; *Harmony v. Bingham*, 2 Ker. 99; *Bos. & S. Glass Co. v. City of Boston*, 4 Metc. 181; *Chandler v. Sanger*, 144 Mass. 364; *Stephen v. Daniels*, 27 Ohio St. 527; *Tuttle v. Everett*, 51 Miss. 27; *Howe v. State*, 53 Miss. 57; *Robin-*

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son v. Ezzell, 72 N. C. 231; *First National Bank v. Watkins*, 21 Mich. 483; *Atwell v. Zeluff*, 26 Mich. 118; *McKee v. Campbell*, 27 Mich. 497; *Carew v. Rutherford*, 106 Mass. 1; *L. & I. Railroad Co. v. Pattison*, 47 Ind. 311. The case of *Potomac Coal Co. v. C. & P. Railroad Co.*, 38 Md. 226, is not in harmony with the above, but we decline to follow it.

It is contended for appellant that the penalties imposed by the act approved April 19th, 1873, Pamph. Acts, 62, were repealed by the act "to prevent excessive charges by railroad companies," approved March 17th, 1875, Pamph. Acts, 243. The language of the former statute is, "any railroad company, manager, agent or officer, violating the provisions hereof, shall be liable to the party injured thereby in double the amount of the overcharge; but in no case shall the penalty be less than twenty dollars." The language of the latter statute is, "that any officer, manager or agent of any railroad company, lessee, association or corporation managing or operating any railroad in this State, who violates the provisions of an act entitled 'an act regulating the charges for transportation of freight upon railroads within this State,' approved April 19th, 1873, shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not less than one hundred, nor more than five hundred dollars for each offense." There are no words in the statute expressing the intention to repeal the former law, but the argument is that the later enactment is repugnant to the former, and therefore repeals it by implication. The former statute imposes a penalty, to be recovered in a civil suit by the party injured against the railroad company, its manager, agent or officer. The latter enactment seeks to uphold the police authority of the State, and declares a violation of the statute to be a misdemeanor in the officer, manager or agent, by whom it is violated. And, to so frame the statute as to embrace all conceivable infractions of the law, the statute makes the officer, manager or agent alike liable, whether he derives his authority from the railroad company, from a lessee thereof, or from an association or corporation managing or operating the road. Such is our construction of the statute, and we do not think the legislature intended to declare that the railroad corporation, lessee, or any association or corporation that might be managing or operating the railroad, should, as such, be indictable. We hold there is no repugnancy in the two statutes, and the later enactment does not repeal the former.

There is nothing in the argument that the repeal of the

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act entitled "an act to furnish the aid and credit of the State of Alabama for the purpose of expediting the construction of railroads within the State," operates as a release of railroad corporations from the restraint imposed by the fifteenth section of that act, or the Mobile and Montgomery Railroad Company, or its successor, from the obligations imposed by the eighth section of the act, under which it received the indorsed bonds of the State. The repealing statute could not divest the rights which had vested under it.—See Pamph. Acts 1874-5, 269; *Wood v. Hustis*, 17 Wis. 416.

The clause, "not exceeding fifty per cent. more than the rate charged for the transportation of the same description of freight over the whole line of its road," found in the act of April 19, 1873, does not mean the *pro rata* allowance which may fall to this road, under the distribution of the products of transportation of through freights proper; those freights which, in their transit, pass over more than one railroad, and merely traverse this road, as a stage in a more extended shipment. We know that much of the freight falling within this description, travels the entire length, or greater part of its journey without change of cars, and in this way, much labor and expense are avoided in the matter of loading and unloading cars. We know, too, that it is the policy of railroad corporations to so connect their lines, as to effect a long, continuous, connected line of transportation; and that under such arrangement, the saving of labor and increase of business resulting from such connection, enable each road to accept as its share of the sum realized from this branch of its business, a sum which would fall much below fair remuneration for receiving, loading, transporting, unloading and delivering the same quantity and description of freight, whose departure and destination were each within the limit of the one road. Hence, we hold that the words, "over the whole line of its road," mean and only mean freight which is taken on at one terminus, and discharged at the other. Thus construed, they furnish an equitable standard by which to graduate the charge for transporting local freight; for it, like the other, involves the labor of receiving, loading, transporting, discharging and delivering. It results that all the testimony of rates on what may be called through freight; that is, freight brought from, or carried to, a point beyond the termini of appellant's road, was improperly received; and in this the Circuit Court erred.

The allowed increase is "fifty per cent. more than the rate charged for the transportation of the same description of

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freight over the whole line of its road." The testimony tends to show that these rates frequently varied, to meet the exigencies caused by competing routes of transportation. We suppose there might be other reasons for changing, from time to time, the tariff of tolls. The prevailing rate charged at the time of shipment, is what the legislature meant: not a rate which had prevailed, or might be afterwards adopted. This rate, like the charge for any other description of work and labor, is not in its nature continuous. It may vary with each rising and setting of the sun. It may be that the range of rates never fell below, nor rose above given sums. However this may be, the rates of any particular time in the past furnish no reliable guide for ascertaining present rates.

Various exceptions were reserved to the admission of evidence, and to charges given and refused, but it is believed the foregoing opinion covers the material points raised by the record, and will furnish a solution of the questions likely to arise on another trial.

Reversed and remanded.

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Petition for Prohibition.

1. *Removal of suit to Federal Court.*—Under the twelfth section of the judiciary act of 1789, as also under the act of Congress of 1867, a suit could not be removed from the State to the Federal court unless all the parties on one side are residents, and all on the other side, non-residents of the State in whose court the suit is brought.

2. *Same.*—Whether the act of Congress of July 27th, 1866, as to the removal of suits from State to Federal courts, is repealed by the later act of March 3d, 1875, is not decided; but the court treats the present application as though both statutes were in force.

3. *State Court, power and duty of; on petition for removal.*—The jurisdiction of the State court is not *ipso facto* ousted by the filing of the petition and bond for removal; the court must examine the petition, in connection with the cause to which it relates, to determine whether the cause and the petitioner's connection with it, entitle him to the removal,—and it is not until this is ascertained that the jurisdiction of the State court ends.

4. *Case; what not removable.*—M. died leaving lands and personalty here, managed by C. trustee, under the will, with authority to pay over the net income of the share of testator's daughter to her, or to her husband if she married. She married G., who resides in New York, and died domiciled there, intestate and childless. The trust property was claimed by Mrs G.'s brothers and sisters under the will; also by R. as Mrs. G.'s administrator, who claimed adversely to them; G. claimed the property under the laws of New York. C., the trustee who resided in Alabama, filed his bill in the

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State court against G., R. Mrs. G.'s administrator, and her brothers and sisters, and others for a settlement of the trust, and for instructions how to dispose of the trust estate. G. was the only non-resident, and he made application to have the cause removed to the Federal court,—*held*:

1. There is no act of Congress which authorized the removal.

2. G. can obtain his distributive share of the wife's personalty, only through R., the administrator, who is an indispensable party, and the controversy of G. is not only with him, but also with G.'s other co-defendants, who claim adversely both to G. and the administrator, all of whom are residents of Alabama except G.; hence the case is not "a controversy which is wholly between citizens of different States, and can be fully determined between them," and can not be removed under the act of Congress of 1875, upon the petition of one of several defendants; and not being a suit to restrain or enjoin G., and his controversy being really with G.'s co-defendants mainly, which can not be disposed of without their presence, the cause is not removable under the act of Congress of 1866.

PETITION for a prohibition to the Chancery Court of Madison county.

Prohibition to chancellor is sought, to restrain him from proceeding in suit of Cruse, trustee, against Moore, Grimball, Rison as administrator of Mrs. Grimball, and others, on the ground that Grimball, a non-resident, had petitioned for the removal of it under act of Congress into the Circuit Court of the United States.

The property involved was Mrs. Grimball's portion of the estate of her father, David Moore, who died many years ago in Alabama. The trustee held, invested, and managed, it under provisions in the will, with authority to pay, only the net income, to testator's daughter, or to her husband, if she should marry. She was married to petitioner, who resided in New York, and a few months afterwards died childless and intestate. The trust property is in Alabama, and is claimed by Mrs. Grimball's brothers and sisters, under the will, and adversely to them by Rison, the administrator in Alabama of her estate, and by Grimball under the law of New York, the State of her domicile. Cruse filed his bill against them all, and some others, for a settlement of his trust and instructions how to dispose of the trust estate. Grimball is the only non-resident. The chancellor overruled his petition.

D. P. LEWIS, for petitioner.—1. Where a petition is presented to the State court, asking a removal of the cause, and the same is in conformity with the act, the aid of which is sought, and no objection is made to the form or substance of the same, and the bond is not objected to as to its form or sufficiency, then the State court "can proceed no further in the suit," until the same is remanded by the action of the

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Circuit Court of the United States to the State court.—Act of Congress of March 3d, 1875, § 3; 2 Abbott, U. S. Practice, pp. 49, 50, 51, edition of 1877, and cases cited in notes; *Insurance Co. v. Dunn*, 19 Wall. 223-4; *Fisk v. U. P. R. R.*, 6 Blatchf. 379, 80-1-2-3; *Shaft v. Phenix Ins. Co.*, 67 N.Y. 546; The Reporter, Oct. 23, '78, p. 515; *Gordon v. Longest*, 16 Peters, 104; id. 622-3; *Ex parte Hill v. Confed. States*, 38 Ala. 431, 450, 460-1; Dillon Removal, § 15, pp. 66, 67; *French v. Hay*, 22 Wall. 244; *Prigg v. State of Penna.* 16 Peters, 608; *Sturgis v. Crowningshield*, 4 Wheat. 193; *City of New York v. Miln*, 11 Peters, 102; *Gibbon v. Ogden*, 9 Wheat. 204; *Slocum v. Maberry*, 2 Wall. 1, 12; Constitution U. S. art. 6; 5 Cranch. 348; 5 How. 295; 4 Wheat. 316; 18 Howard, 331.

2. A critical examination of the allegations of the bill, of the petition, and of section three of the act of March 3, 1875, will show that this is a controversy wholly between citizens of different States, involved in the suit, and that one of the defendants *actually* interested in such controversy is the petitioner, and that the State court transcends its jurisdiction in proceeding further in the same.

3. If one of the questions to which the judicial power extends, under the constitution and laws of the United States, "*forms an ingredient in the cause*," the case is within the judicial power, although other questions of law or fact be involved.—1 Abbott's Pr. (ed. of 1877) 38, (199); *Osborn v. Bank U. S.*, 9 Wheat. 738; *Mayor v. Corp'n*, 6 Wall. 252; *Taylor v. Rockafeller*, The Reporter, August 21, 1878, p. 226.

MANNING, J.—The acts of Congress for the removal of causes from the courts of the States to those of the United States, require on the part of the judges of either government who may have to consider and act under them, candor and good temper. A jealousy of jurisdiction too susceptible of alarm and resentment, is apt to hurry those under its influence into error. The institutions of both governments are established for the good of all: and it is the right of all to have them preserved and upheld in the performance of their respective proper functions. When, therefore, cases arise in which the question to be decided is, whether the cognizance of them belongs to the State courts or the Federal courts, it is the dictate of patriotism, as well as of law, that jurisdiction shall be cheerfully declined by those to which it does not pertain, and exercised without offensive arbitrariness, by those to whom it does belong. According to the Su-

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preme Court of the United States, through the late Chief-Justice CHASE,—“It may be not unreasonably said that the preservation of the States and the maintenance of their governments, are as much within the design and care of the constitution, as the preservation of the Union and the maintenance of the national government.”—*Texas v. White*, 7 Wallace, 700. To the high tribunal which takes this enlarged view of our complex political system, it belongs—ultimately to determine the meaning and proper operation of the statutes under consideration; and its interpretations will probably be as satisfactory as they will certainly be binding on all judges.

The present case does not come under that portion of section 12 of the judiciary act of 1789, which relates to the removal of causes, or under the act of 1867 on the same subject. It is settled that a suit that may be removed under either of these, must be one in which all the parties on one side of it must be residents, and all those on the other side, non-residents of the State in which the suit is brought. Such is not the situation of the parties in this cause.

The only other two statutes on the subject are those of July 27th, 1866, and March 3d, 1875. In the opinion of some judges and lawyers of eminence, the former of these was repealed by the latter. But a contrary conclusion was expressed on the circuit, in the summer of 1877, by Justices BRADLEY and MILLER of the Supreme Court of the United States; by the former in the case of *Girardey v. Moore et al.*, in Georgia, and by the latter in *The Board of County Commissioners v. Kansas Pacific R'y Co. et al.*, in Colorado. See 5 Cen'l Law, J. 78 and 102. And we shall consider the concurrent opinions of these distinguished judges as establishing that the act of 1866 was not repealed.

According to this act, when a suit is brought by a citizen of one State in a court of that State, “against a citizen of the same and a citizen of another State,” the suit may be removed by the latter, “if, so far as it relates to him, it is brought for the purpose of restraining or enjoining him, or is a suit in which there can be a final determination of the controversy, so far as concerns him, without the presence of other defendants as parties to the cause.”—Rev. Stat. of U. S., § 639. In *Girardey v. Moore et al.*, the suit was brought to restrain Moore, a mortgagee, who resided in another State, from foreclosing his mortgage of the property involved; and in the opinion of the presiding justice, his co-defendants were not necessary parties so far as the controversy with him

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was concerned: Wherefore the cause was retained in the Federal court, under the authority of the act of 1866. But in the present suit, there was no purpose to restrain or enjoin Grimball, the non-resident party: And it is obvious from the bill, and results from his own averments in his petition, that the controversy he claims the right to wage, is a controversy against some of his co-defendants, and not against the plaintiff. The act of 1866 may, therefore, be dismissed from further consideration.

The act of 1875, in section 2, provides that, when, in the suit to be removed, "there shall be a controversy which is *wholly between citizens of different States*, and which can be fully determined *as between them*, then either one or more of the plaintiffs or defendants, actually interested in such controversy, may remove said suit into the Circuit Court of the United States for the proper district."—Acts of 1874-75, 471, § 2.

In reference to the first section of this act, defining the cases of which "the Circuit Courts of the United States shall have original cognizance, concurrent with the courts of the several States," Justice BRADLEY'S opinion, expressed in the case above mentioned, is, that "the jurisdiction given to the Circuit Court is as broad as the judicial power" vested by the constitution in the general government: And to that, he gives the largest extent ever conceded to it by any other judge, and a larger one than some others consider consistent with the constitution. But in regard to the second section of the act of 1875, the same learned justice ruled, that if in a suit brought in a State court, there be a controversy between citizens of different States, but "some of the plaintiffs and defendants are citizens of the same State, the removal must be sought by all the defendants," and that it is only when "all the plaintiffs on one hand, and all the defendants on the other are citizens of different States," that any one or more of either less than all, can effect the removal. Only in the latter case, would there be in the language above quoted from the second section, "a controversy which is wholly between citizens of different States, and which can be fully determined between them." "But in either case" (says Justice BRADLEY) "it is the suit that is removed, and not a part of the suit."

With this, the opinion of MILLER, J., in *The Board of Co. Comm'rs v. Kansas & Pac. R'y Co. et al.*, (*supra*), appears to agree. And he refused to remand that cause to the State court, for the reason that, in his opinion, the real contro-

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versy, when unnecessary parties to the suit were set aside, was wholly between persons who resided in different States, and the real litigation was between them, notwithstanding the plaintiffs were compelled to place the corporation in whose favor the bill prayed relief, and of which they were only stockholders, in the position of a defendant in the suit, because, (as was alleged) the faithless and fraudulent directors who had charge of it, would not allow it to appear as plaintiff.

We have referred to these cases especially, because they go further than any others we have seen, in asserting and exercising authority to remove causes pending in State courts into the courts of the United States. Do the rulings and reasonings in them embrace a case like the present? Let us examine it, only so far as to understand the object of the suit and the relation of the parties.

Cruse, the complainant, had been appointed trustee, in 1874, (after the death of a former trustee,) of the property involved. It consisted of realty and personalty valued, in Grimball's petition, at about \$100,000. The trust was created by the will of Moore, the testator, and covered the respective shares of all his daughters in his estate. But Cruse was trustee of his daughter Catherine's portion only. In that capacity, he was required to keep the possession, care and management of the trust estate under his own control, and to pay over only the net income thereof to her, or, if he thought it prudent so to do, to her husband, if she should marry. She married Mr. Grimball in November, 1876, and died childless and intestate in July, 1877. Whereupon conflicting claims are set up to the trust funds and property, *viz.*, on behalf of Mrs. Grimball's brothers and sisters, as entitled to it by the provisions of the will, by Rison, as administrator for the payment of debts and distribution, and by petitioner Grimball.

The great responsibility imposed on Cruse as trustee, is not lessened by the demand that he shall account to so many claimants. He is by no means a mere stakeholder, as the petitioner styles him. On the contrary, he has a profound interest in the cause. He must account therein for the trust estate and the management and proceeds of it, since it came to his hands. He must show that he has not, by lack of diligence, failed to obtain all the property and effects belonging to that estate; and this has induced him to make the executrix of his predecessor, also, a defendant; and the decree is

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to be rendered against himself, the trustee and plaintiff. In courts of equity, persons in the situation of this trustee, and liable to be sued as defendants, may initiate, as plaintiffs, the proceedings for settlements to eventuate in decrees against themselves, which when satisfied, will exonerate them. But a plaintiff in such a case will be held to a responsibility no less strict than if he were pursued as a defendant. It behooves him, therefore, to see to it, that all persons to whom he may be answerable for the manner in which he has executed his trust, be made parties to the cause in which he accounts, so that when the judgment of the court shall be satisfied, he will be forever discharged. And, of course, for the same reason, it is important to him, that the court rendering the decree shall have jurisdiction.

Where, then, must this suit be prosecuted? All the parties "actually interested," or claiming to be so, are citizens of Alabama and reside in Madison county, except Mr. Grimball. He lives in New York. And if he be successful in his contention that the gift to his wife was not of a mere life estate, but of the realty in fee simple, and of the entire property in the personalty,—still the personalty can not in any event be delivered by the trustee to him. Before him comes the administrator, who also is a citizen of, and according to our statutes, must reside in Alabama. Mr. Grimball can be entitled to make claim no other wise than as a distributee; and though he be, as we understand him to claim that he is, the sole distributee of his wife's personal property, yet he can derive that here in question or such as shall remain after administration, only through the administrator. To him the law commits it, and confers on him the entire transmissible ownership, legal and equitable, that was in Mrs. Grimball when she died, for the purpose of enabling him to get in all the assets, discharge all legal and equitable claims against the same, and make distribution of the residue. Therefore, also, no receipt or voucher that Grimball could execute to Cruse for such property or money, would avail against the claims of Rison, the administrator. Indeed, Mr. Grimball was not perhaps a necessary party to Cruse's suit at all. The right of the administrator, being a continuation in him of that of Mrs. Grimball, rests upon the same foundation as that upon which Mr. Grimball's claims are based, to-wit, that there was in her a transmissible ownership. The maintenance of this, is essential to the administrator's title; and being next in succession to Mrs. Grimball, his intestate, he is an indispensable party to the controversy. And if he

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should fail faithfully to assert his rights as administrator against the claims of Mrs. Grimball's brothers and sisters, and thereby not obtain property he was entitled to, he would be answerable for such neglect hereafter, to her creditors or distributees. But neither Mr. Grimball nor any other distributee has a right to the possession now of any part thereof.

In our opinion the persons who are the most material, if not the only indispensable parties on either side of the controversy, are those who reside in this State. None of them join Mr. Grimball in his petition for a removal of the suit; and there not being in it a "controversy which is wholly between citizens of different States and which can be fully determined between them," it is not such a suit as, under the act of 1875, can be removed upon the petition of one only of the several defendants.

But it was further very strenuously contended in this cause, in support of the application to us for a prohibition to the chancellor, that upon the filing of a petition in conformity with the act of Congress and offering a bond for costs, as is prescribed, by a person sued in a State court, the jurisdiction of that court ceases, and it must "'proceed no further in such suit,' until the same is remanded by the action of the Circuit Court of the United States to the State court;" that is, although the record or papers of the suit in the State court clearly show (as in this instance), that it was not removable under the act, and the Federal court would, therefore, have to repudiate and remand it, yet the State court could not look beyond the petition and bond, (if they were in proper form and the allegations of the petition sufficient,) into the papers of the suit, to determine for itself, whether it was or not, such an one as the law made transferrible from the State court, and of which its jurisdiction could be thus taken away.

We are not unmindful of the evils that may ensue from the exercise of a clashing jurisdiction by the courts of the two governments over the same parties and causes; and we think it the bounden duty of those tribunals to do all they properly may, to prevent such consequences. But, that a State court shall be paralyzed into impotency by the mere presentation of the petition and bond, however well drawn and executed, of a party sued therein, and be made incompetent to proceed further, even though the record and papers on file show that the suit is not embraced within any of the acts of Congress on the subject of removal, is, it appears to us, an indefensible position. Why should a petition

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be presented at all, if no response is to be made to it, and no consideration given to the matter of it? According to the argument, it were fitter that the petition should be in form, as well as effect, a notice to the court that the person filing it demanded that its interference with him and his affairs cease, and that the suit by which he had been brought there be transferred to another jurisdiction. Did the senators representing the several States of the Union vote the passage of an act intended to be so injurious to the authority and dignity of the tribunals by which the laws of those States are enforced, justice administered, and peace and order maintained?

The acts of Congress particularly define the character of the suits which may be removed and the relation thereto and toward the other parties, of the persons to whom the privilege of removal is conceded. And it is enacted that if, *in any such suit*, a party "*entitled to remove it*," files his petition and bond, &c., the State court shall proceed no further. It is only when those conditions exist that the court is ousted by law of its jurisdiction. By yielding it in any other case, a judge would not be obeying the law, but submitting to the demand of an individual. And whether he is doing the one or the other he can not know, without so far looking into the case, as to ascertain if it be removable or not, according to the statute. To do this, is a duty he owes to the State that created his court and conferred its powers, coupled with the obligation to employ them in administering justice, in all cases within its cognizance, brought before it—except such as may be transferrible and transferred by superior authority to another jurisdiction.

The importance of making such an examination is forcibly impressed by an accidental circumstance in the present case. By a mere oversight, the petition of Grimball, while purporting to set forth the names of all the parties to the suit of Cruse, (a statement needful to the end in view,) omits any mention of Rison, the administrator; who, as we have seen, is an indispensable party to the cause, more important as such, than the petitioner himself, to a final determination of it. The omission was evidently a mistake, for Rison's name and office and position as defendant, are mentioned in the bond that was filed with the petition. But how easy would it be if the views of petitioner's counsel are correct, for one whom a little delay might enable to commit a great fraud, (against which the statute provides for no security in the bond it prescribes,) to avail himself, in order to do so, of

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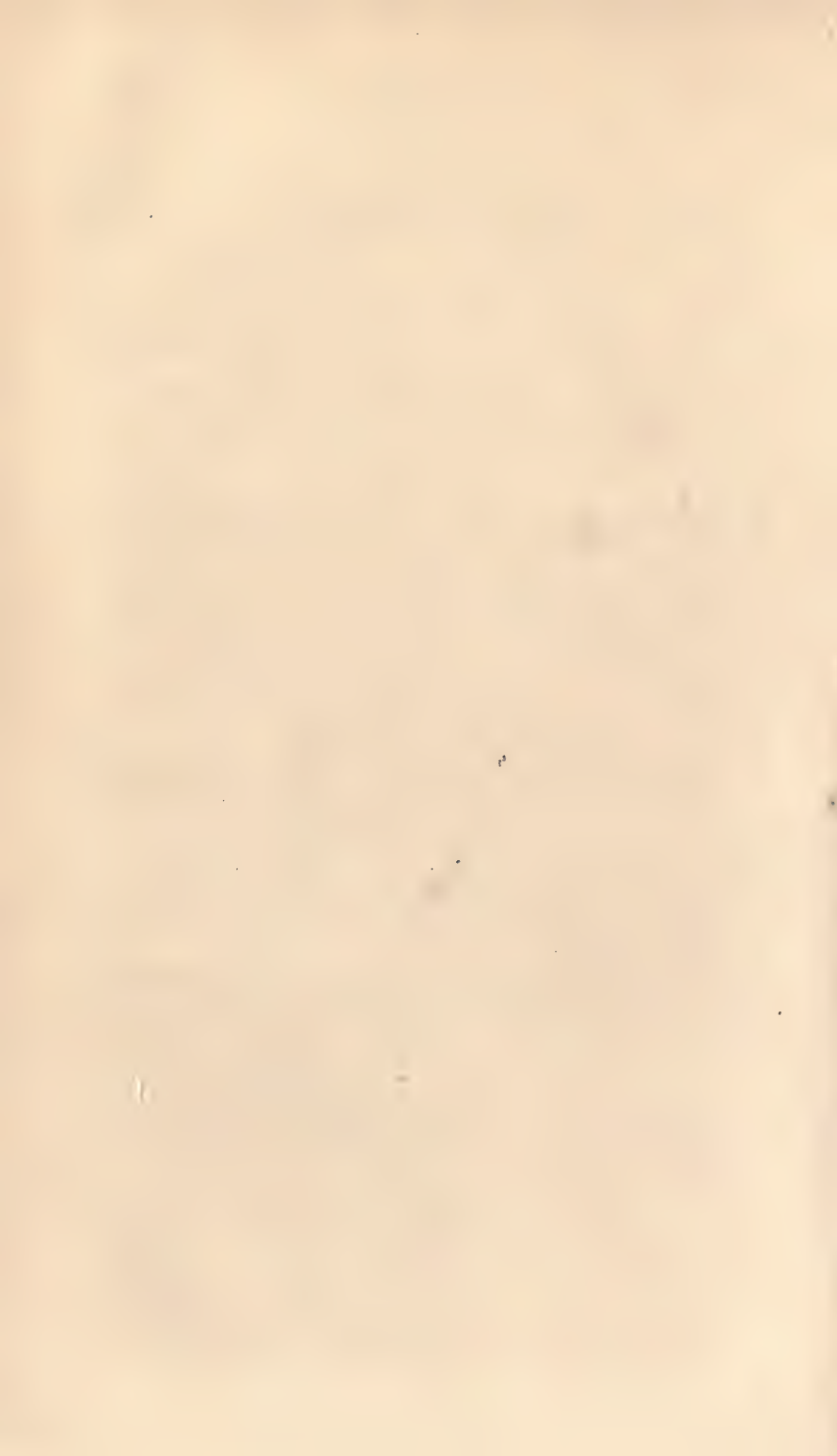
this process of removal in almost any case, by merely filing in court his unverified petition, (no oath to it is required,) and an inadequate bond. By the time the cause should be remanded, all the means available to the plaintiff of obtaining satisfaction, may have been put beyond his reach.

It is not necessary, however, to discuss this matter further. We understand our view to be the same as that of the Supreme Court of the United States. It is supported by the opinion of the chief-justice in *Railway Co. v. Ramsey*, 22 Wall. 328; and the recent case of *Insurance Co. v. Pechner*, 95 U. S. Rep. 183, is confirmatory of the like conclusion. In the latter case, a removal was prayed of a suit brought in a State court of New York, which court, regarding the petition as not showing a sufficient cause for the transfer, refused to allow it, and proceeded to trial and judgment. This was affirmed in the New York court of appeals; whence the cause was carried by writ of error to the Supreme Court at Washington; and that tribunal concurring in the opinion of the courts of New York, affirmed their judgment.—See, also, *Gold Washing & W. Co. v. Keyes*, 96 U. S. 199.

In these instances, it is true, the defect appeared on the face of the petition itself. But every such petition makes the case it relates to, by reference to it, a part of the petition, and can not be properly understood without some knowledge of the case. The decisions cited are, therefore, in our view, authorities in support of the proposition that the State court must examine the petition, and if necessary look into the case to which it relates, in order to ascertain whether it and the petitioner's relation to it, are such that he is entitled to the removal he prays for. If he is, the court "has no discretion and is compelled to permit the transfer to be made." *Railway Co. v. Ramsey*, *supra*. If he is not, its jurisdiction remains unimpaired.

We do not extend our opinion beyond the questions that arise in the cause before us. The chancellor's ruling in it we think was correct; and it follows that the writ of prohibition applied for must be refused.

BRICKELL, C. J., not sitting.



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ACTION.

1. *When can not be maintained.*—A promise to pay the debt of another will not support action, unless founded on a precedent liability or a new consideration.—*Underwood v. Lovelace*, 155.
2. *Same.*—Where, however, by the arrangement between the creditor and the promissor, the original debtor is discharged, and a new debt is created binding on the promissor alone, the promise, whether verbal or written, is supported by a valuable consideration—the detriment to the promisee in the extinguishment of the original debt—and will support an action, though no consideration moved from the original debtor to the promissor, and though there was no request from the original debtor, or subsequent assent on his part. (*Overruling, on last point, Williams v. Sims*, 22 Ala. 512.)—*Ib.* 155.
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5. *Corporation; action against, for torts.*—A corporation is civilly liable for torts, or for acts and negligence of its servants or agents while in its employment, to the same extent and under the same circumstances as a natural person; the only limitation being, that it is not liable civilly or criminally for torts, of which malice is an essential ingredient.—*South & North Ala. R. R. Co. v. Chappell*, 527.
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7. *Illegal contract, when action lies on subsequent agreement growing out of.*—All contracts encouraging prostitution, or auxiliary to the keeping of a bawdy house, are void, and the aid of the courts can not be invoked to rescind or enforce them; the principle, however, is confined to the illegal act, or to the original contract, and is not extended to subsequent, new and independent transactions, founded on a new consideration, not a part of the original scheme, though between the same parties and having relation to the same property.—*Lea, Adm'r, v. Cassen*, 312.

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8. *Same.*—Parties to a void and illegal contract may rescind it, and place themselves in *statu quo*, no other consideration being necessary than their mutual agreement; and when it is agreed that money paid under the rescinded contract should be restored, an action to recover it back can be maintained upon the agreement of rescission, which is a new and independent agreement, founded on a new consideration, removed from and not a part of the original transaction, and unaffected by its illegality.—*Ib.* 312.
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10. *Money had and received; when action for, lies.*—The nature of the business considered, the shipper does not stand on equal terms with the carrier, in contracting for charges for transportation; and if the shipper pays the rates established in violation of law by the carrier, rather than forego his services, such payment is not voluntary, in the legal sense, and the shipper may maintain his action for money had and received, to recover back the illegal charge.—*M. & M. Railway Co. v. Steiner, McGehee & Co.*, 560.
11. *Trial of right of property; what confers sufficient title to maintain.* H. owed W. and gave him an instrument intended to create a lien for crop advances, but such was not its legal effect. W. obtained possession of a part of the crop from H. with his consent, to pay the debt with it, and sold to S.,—*held*: S. had such title or right of possession as would enable him to maintain a trial of the right of property. *Carter v. Wilson*, 434.
12. *Receipt; on what, action may be maintained.*—A receipt given by the husband to his wife, acknowledging that he had received from her a certain amount of money, for investment, with a like amount of his own, in certain exchange which he purchased, and that the wife was entitled to one half the proceeds when sold,—is not a contract between husband and wife, within the meaning of the statute forbidding their contracting with each other; and a complaint by the wife's administrator against the husband's personal representative, claiming a sum certain as due according to such receipt, which is set forth, discloses a substantial cause of action.—*Haynie v. Miller*, 62.
13. *Detinue; what does not disable vendor from maintaining.*—P. sold and delivered five bales of cotton to M. & Co., at a stipulated price for cash. P. had purchased two of the bales from his son, who owed M. & Co., who on that account refused to pay for them. A third person had a mortgage on the two bales, which P. agreed to satisfy. P. thereupon agreed with M. & Co. that they might pay the mortgage debt out of the agreed price, and the residue to himself, but made no new agreement respecting the price or sale. M. & Co. paid the mortgage debt, but refused to pay the balance to the vendor,—*held*: The vendor was not divested of title, or disabled from maintaining detinue against the purchaser.—*Moore, Waldman & Co. v. Parks*, 409.

For revival and abatement of actions, see PLEADING AND PRACTICE.

ACKNOWLEDGMENT.

See DEEDS.

ADMINISTRATORS.

See EXECUTORS AND ADMINISTRATORS.

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1. *Lien for advances to make crop; to what extends.*—The statute as to advances to make crops, gives the advancer, who complies with its terms, a prior lien upon the crops, and stock bought with the money advanced to enable the party to make a crop; but it was not intended, and does not have the effect, of enabling the party, obtaining the advances, to give a lien displacing prior liens on property owned at and before the advances, and not procured with such advances.—*Evans v. English*, 416.
2. *Same; what will not constitute.*—The statute will not give an instrument the privileges of the statutory lien for advances, unless its terms conform to the statutory requirements, and it is founded on the precise consideration expressed in the statute; an instrument securing not only advances, but debts founded on a different consideration, is not what the statute contemplates, and will not give the statutory lien, though if properly framed it may have effect as a mortgage.—*Ib.* 416.
3. *Same.*—A note or other obligation acknowledging an indebtedness for advances to make a crop, &c., will not create a lien on the crop, if in fact the consideration of the note is a mere antecedent debt of the maker: and one not a party or privy to the instrument may contradict its recitals by parol, showing a different consideration from that recited.—*Carter v. Wilson*, 434.
4. *Same; when prior to attachment lien.*—The crop lien is created, when advances are made in compliance with the statute, and not by levy of the attachment, which is but process to enforce an existing lien,—while in ordinary attachments the lien does not begin until the levy; and hence, where property attached for advances is claimed, under a right or title ante-dating the levy, the advancer may recover under his crop-lien, if older than or superior to the right of the claimant, though such right accrued prior to the levy.—*Ib.* 434.
5. *Lien for advances; who can not enforce by attachment.*—The assignee of a note or obligation given for advances to make a crop, can not enforce the lien by attachment; the statute confers the right to that remedy upon the advancer alone.—*Ib.* 434.

See LANDLORD AND TENANT.

ADVERSE POSSESSION,

See EJECTMENT.

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2. *Principal; how may be bound by acts of unauthorized person.*—A single instance of recognition by the principal, of the unauthorized assumption of agency by a third person—as by payment of the debt contracted—in the absence of any warning, caution or notice to the person dealing with the supposed agent, will bind the principal as to him, for other similar contracts of such person; but the rule applies only to the person thus dealt with.—*M. & M. Railway Co. v. Jay*, 247.
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See that title, under PLEADING AND PRACTICE, and CHANCERY.

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See ERROR AND APPEAL.

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1. *Affidavit for attachment; what sufficient.*—An affidavit for attachment, made by the attorney of a non-resident creditor, which states that affiant is "*informed and believes, and therefore states,*" that defendant, who is also a non-resident, is justly indebted, &c., is not defective. *Mitchell v. Pitts & Henry*, 219.
2. *Advances; when prior to attachment lien.*—The crop-lien is created, when advances are made in compliance with the statute, and not by levy of the attachment, which is but process to enforce an existing lien,—while in ordinary attachments the lien does not begin until the levy; and hence, where property attached for advances is claimed, under a right or title ante-dating the levy, the advancer may recover under his crop-lien, if older than or superior to the right of the claimant, though such right accrued prior to the levy.—*Carter v. Wilson*, 434.
3. *Lien for advances; who can not enforce by attachment.*—The assignee of a note or obligation given for advances to make a crop, can not enforce the lien by attachment; the statute confers the right to that remedy upon the advancer alone.—*Ib.* 434.

ATTORNEYS.

1. *Fees of; when may be included in mortgage.*—A stipulation in the mortgage, that the mortgagor, in addition to legal interest, shall pay to the mortgagee attorney's fees incurred in collecting the debt, will not render the agreement usurious; but a reasonable amount only can be collected, though a larger sum or per cent. is agreed on.—*Munter & Faber v. Linn*, 493.

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1. *Inspection of public record in Auditor's office; when denied.*—Where the party has no interest, or the disclosure sought would be detrimental to the public interests, inspection of the records of an executive department of the government may be denied.—*Brewer, Auditor, v. Watson*, 310.
2. *Same; when can not be denied.*—Public interests are not endangered, by allowing a tax-collector, or his attorney, to inspect the collector's account with the State, as kept in the books in the Auditor's office; and if such inspection is requested, and the Auditor denies it, *mandamus* lies against him.—*Ib.* 310.
3. *Auditor; power of, to re-state accounts settled by his predecessor.*—The Auditor in settling a public official's account for one year, has no authority to re-state an account settled and certified by his predecessor in a former year, embracing in the last account items which should have been included in the former, and then by certifying such re stated account, make it presumptive or *prima facie* evidence of its correctness; as to the items thus brought forward, the Auditor's certificate furnishes no evidence of their correctness.—*State ex rel. v. Brewer*, 318.
4. *Same.*—The failure of the Auditor, in settling with a public official, to include items with which he was justly chargeable, will not debar the State from an appropriate action against the officer; but the error must be shown, as in other cases of mistakes in accounting; it can not be

AUDITOR—*Continued.*

proved or shown *prima facie*, by a re-statement by a succeeding Auditor.—*Ib.* 318.

5. *Mandamus*; when will not lie to correct re-statement.—Where it is not averred that the Auditor has certified, or will attempt to certify, as correct, items brought forward from the settlement had in a former fiscal year with his predecessor, or that suit has been brought or threatened to be brought, such alteration of the account works no harm to the officer; and having an ample remedy in defense of suit, if brought, he is not entitled to *mandamus* to compel the Auditor to strike out such disputed items.—*Ib.* 318.

BILL OF EXCEPTIONS.

1. The bill of exceptions is not the proper place to set forth rulings upon pleadings, and where such rulings are shown only by recitals in the bill of exceptions, they will not be revised.—*Ex parte Knight*, 589.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. *Who may draw*.—A partnership in the business of buying cattle and slaughtering them for sale, and dealing in vegetables and like commodities, is a commercial partnership; each member of which has the right to draw, accept, or endorse, bills of exchange in the firm name, and bind the partnership, as to third persons, dealing fairly and in good faith, as to matters usually incident to the business; and it is immaterial in such a case, as to a person thus dealing with one of the partners, that the other was not informed of the transaction, and repudiated it as soon as it came to his knowledge.—*Wagner v. Simmons & Co.*, 143.
2. *Note; when maker can not dispute, or inquire into consideration of*.—Where the debtor, at the request of the creditor, makes a note payable to a third person, who sues the maker, the latter can not, in that suit, inquire into or dispute the consideration, moving between the creditor and the payee of the note, or show that it had failed.—*Lea v. Cassen*, 312.
3. *Failure to read; will not avail*.—One who can read and write, and had ample opportunity to read the whole of a note containing a waiver of exemptions, before he signed it, can not, in the absence of fraud or misrepresentation practiced on him, set up his own failure to read the note, in order to avoid its stipulations, or in support of a plea putting in issue the fact of the waiver of exemptions.—*Goetter, Weil & Co. v. Pickett*, 387.
4. *Commercial paper; what defenses may be made to*.—The indorsee of commercial paper acquiring it after maturity, or before maturity merely as collateral security for a pre-existing debt, takes it subject to all the defenses which the maker could prefer against the payee, if he had remained the holder; and this right exists as to matters of set-off and discount, as well as to defenses affecting the instrument itself.—*Wagner v. Simmons & Co.*, 143.

BONDS.

1. *Bond; what may be enforced by common law remedies*.—Bonds executed to civil officers, in the course of judicial proceedings, whether authorized by statute or not, if entered into voluntarily, supported by valuable consideration, and not in contravention of public policy or offensive to law, will be enforced by common law remedies.—*Munter & Faber v. Reese et als.* 395.
2. *Same*.—When the bond in suit was executed, there was no law authorizing a sheriff, who had process for the seizure of specific property in a *detinue* suit, to arrest execution of the order of seizure, upon interposition of a claim by a stranger, and the execution of bond to the plaintiff in the suit, conditioned for the forthcoming of the property,

BONDS—*Continued.*

if the claim was not successfully prosecuted; yet if in mutual misapprehension of the claimant's rights, she executes, and the sheriff accepts such forthcoming bond, and thereon the sheriff delivers the property to her, the plaintiff in the *detinue* suit, though the bond was taken without his consent, may ratify the sheriff's unauthorized act, and upon judgment in the *detinue* suit and return of *nulla bona*, and allegation and proof of failure to prosecute the claim to effect, may recover upon the bond.—*Ib.* 395.

3. *Costs; execution for, against obligors on injunction bond; when register may issue.*—Under our statutes, in all cases where an injunction has been obtained, and costs decreed against the complainant on its dissolution, the register may, without a reference or further order of the court, issue execution for costs, against any or all of the parties to the injunction bond.—*Newsom v. Thornton*, 95.

CHANCERY.

I. JURISDICTION AND GENERAL PRINCIPLES.

1. *Bill to establish partnership; when not maintainable.*—A bill will not be entertained to establish a partnership between two persons, settle its dealings, and declare one of them trustee for the benefit of the other as to purchases of real estate, when more than twenty years have elapsed since the accrual of the right, before suit brought, during all of which period the defendant denied and disregarded the rights of the other alleged partner; and the fact that the partners were brothers, complainant being averse to litigation, and on that account failing to sue in time, will not alter the case.—*Phillippi v. Phillippi*, 80.
2. *Stale demands; rule as to.*—Where a claim is sought to be enforced, *prima facie* within the operation of the rule against stale demands, the complainant should show by positive and specific allegations, some act or recognition of the party sought to be charged, within the period which will take the case out of the rule; mere general and vague averments of facts and circumstances, out of which the right sought to be enforced arises, or on which recognition of it is sought to be based, will not suffice.—*Ib.* 80.
3. *Bill to enjoin sale under mortgage; when demurrable.*—A mortgagor seeking to enjoin a sale, under a power in the mortgage, on the ground of usury, must either bring the money and interest into court, or must by his offer submit himself to the jurisdiction of the court, that it may do complete equity between the parties; otherwise, his bill is demurrable.—*Eslava v. Crampton*, 507.
4. *Same.*—Where the bill contains such offer, a decree of foreclosure may be made without any cross-bill; and a cross-bill being unnecessary, it is immaterial whether a cross-bill was formal, or had been properly put in issue.—*Ib.* 507.
5. *Same.*—Answers prayed to be taken as cross-bill in such a cause, whether put at issue or not, authorize the complainants in them to move for a receiver.—*Ib.* 507.
6. *Bill of review; when not maintainable.*—To justify relief on bill for review, under the rule settled by the decisions of this court, the record of the former suit, independent of the testimony, must satisfactorily and distinctly show that the court committed an error of law in the decree reviewed, arriving at an erroneous conclusion of law upon facts found by the record; erroneous inferences from the testimony, or error in denying it proper weight, and the like, are not matters for bill of review, and can be considered only on appeal.—*Tankersly v. Pettis*, 354.
7. *Same.*—Though the averments of the original bill authorize larger or different relief from that specially prayed, the error of not granting relief under the general prayer, can be reached only by appeal, and will not support a bill of review for error apparent.—*Ib.* 354.

CHANCERY—*Continued.*

8. *Heir; when will be enjoined from prosecuting ejectment.*—Lands descended to infants were sold under order of the Probate Court, for division. The sale was confirmed, the purchase-money paid, and a conveyance ordered to the purchaser, but the administrator failed to execute it. The record showed enough to sustain the sale on collateral attack. The administrator made final settlement, accounting for the proceeds of the sale, and the heirs' respective shares thereof were paid to their guardian, who disbursed it for their support. No fraud or unfairness was charged,—*held*: The purchaser acquired a good equitable title to the land; and a court of equity at his instance, or one claiming under him, will enjoin ejectment by the heirs, after attaining majority, to recover the land.—*Bibb v. Bishop Cobbs Orphans Home*, 327.
9. *Bill; when demurrable.*—A bill to foreclose a mortgage of lands by a married woman is demurrable, unless it sets forth the substance, at least, of the deed or other instrument under which the estate is held, that the court may determine the nature of the estate, and her power over it.—*Sprague v. Shields*, 429.

II. PLEADING AND PRACTICE.

10. *Usury; what allegations as to not sufficient to put in issue.*—A mortgagor who, upon dispute with the mortgagee as to the amount due, files his bill to ascertain the mortgage indebtedness, and for a sale of the property, if necessary for its payment—does not by the general allegation that “from time to time he has made various payments” on the mortgage debt, which reduce it below the amount the mortgagee claims, put in issue the right to credits for payments, beyond eight per cent. per annum, made to the mortgagee not as credits on the debt, but for forbearance, and to induce him not to foreclose, after the debt matured.—*Munter & Faber v. Linn*, 492.
11. *Same.*—Nor in such a case, is the defect of the bill cured, by a consent decree directing the register “to state an account of the amount due the mortgagee upon the mortgage debt, allowing him eight per cent. interest upon the debt after maturity, and deducting therefrom all sums of money paid the mortgagee at the date of the several payments.” Such decree, when tested and construed with reference to the pleadings, relates only to payments made as such, on the debt, and not to usurious exactions paid merely for forbearance.—*Ib.* 492.
12. *Amendment; when properly disallowed.*—After final decree settling the equities, a party is not entitled as matter of right to have an amendment allowed, which authorizes the introduction of proof effecting a different result; the chancellor may decline at that stage of the proceedings, to allow it.—*Ib.* 492.
13. *Material defendant, to bill for foreclosure.*—Under our laws relative to the transmission and descent of realty, and the enlarged power of the Chancery Court in foreclosure suits,—which are widely different from the English laws and practice,—the personal representative of a deceased mortgagor is a material defendant to a bill for foreclosure; and the omission is fatal to the decree, and will be noticed *ex mero motu* by the appellate court.—*Dooley v. Villalonga*, 129.
14. *Omission to make administrator a party; what does not cure.*—When no reason is shown why the administrator is not made a party, the appointment of an administrator *ad litem* will not cure the defect.—*Ib.* 129.
15. *Reexamination of witness; when not allowed.*—The reexamination of a witness after hearing and final decree, for the purpose of altering or correcting his testimony, as to a matter discussed in court and judicially weighed, opens a wide door for fraud and perjury, and ought not to be tolerated.—*Harrell v. Mitchell*, 270.

CHANCERY—*Continued.*

16. *Petition; what relief can not be granted on.*—Where decree is rendered against co-sureties upon a bond, it is error to modify it, upon petition of one of the defendants, so as to render the other primarily liable for the common burden; if such an equity exists, it must be presented by cross-bill.—*May v. Duke*, 53.
17. *Bill to enjoin collection of judgment; who, not proper party to.*—The sheriff should not be made a defendant to a bill to enjoin the collection of a judgment at law, when his only connection with or interest in the case arises out of the discharge of his duties, as executive officer of the court, in the collection of the execution; the injunction, upon the sheriff's being notified of it, binds him as completely as if he were a party.—*Collier and Wife v. Falk*, 105.
18. *Injunction; when properly dissolved.*—A temporary injunction, granted on the allegations of the bill, without notice to the parties adversely interested, is properly dissolved on the denials in the answer of a sole material defendant, fully and positively denying all the allegations, upon which the equity of the bill is rested, unless the facts be such that the court can find therein some good and substantial reason for retaining the injunction.—*Ib.* 105.
19. *Variance between allegation and proof; effect of.*—The pleadings and proof must correspond, and a material variance between them, however clear may be the equity of the complainant, is fatal to relief.—*Helmetag v. Frank*, 67.
20. *Execution on decree in chancery; when erroneous.*—A decree in a foreclosure suit, or bill to enforce a vendor's lien, ascertaining the amount of indebtedness, has the force and effect of a judgment; but execution can not issue thereon until after sale and confirmation and decree ascertaining the balance due.—*Winston v. Browning*, 80.
21. *Decree of sale; what erroneous.*—Where, before bill filed, a fraudulent grantee conveyed parts of the lands to others, and put them in possession, and these persons, though named, are not made parties, nor description given of the portions of land sold to them,—a decree under which such parts of the lands could be subjected, is erroneous, and will be here corrected.—*Harrell v. Mitchell*, 271.

CHARGE OF COURT.

1. *Charge; what erroneous.*—A charge on the trial of the right of property, between the wife and an execution creditor of the husband, that the possession of the husband and wife jointly, is the possession of the husband, is erroneous and properly refused; when the evidence shows the wife had an equitable estate and was a "free-dealer," the law in such a case refers the possession to the title.—*Newbrick & Bros. v. Dugan*, 251.
2. *Charge; what properly refused.*—In trover by the mortgagee against one obtaining cotton from the mortgagor, the fact that the mortgagor told defendant before he took it, that the cotton was set apart for plaintiff, is admissible to show that the defendant knew the cotton was embraced in the mortgage and not being offered or relied on to show title in the plaintiff, the court properly refuses, as abstract, a charge that the mere fact the mortgagor made such declaration vested no title in the plaintiff.—*Steiner & Bro. v. McCall*, 406.

See this Title, under CRIMINAL LAW.

COMMON CARRIER.

See RAILROADS.

CONSTITUTIONAL LAW.

1. *Grand jury; power of legislature to prescribe mode of drawing.*—While the constitution prohibits indictments otherwise than on the present-

CONSTITUTIONAL LAW—*Continued.*

- ment of a grand jury, it imposes no restraint or limitation on legislative power in declaring the mode in which the jurors shall be drawn or summoned, or which inhibits the consultation of public convenience in determining whether the jurors shall be selected from the body of the county at large, or from a particular vicinage.—*Williams v. The State*, 33.
2. *Act establishing Perry Court of Quarter Sessions; constitutionality of ninth section of.*—The ninth section of the act establishing the Court of Quarter Sessions for Perry county, requiring that the grand jurors for the November term of the court, shall be drawn from the immediate vicinity in which the court was held, is not violative of the letter, spirit, or purposes, of the constitution.—*Ib.* 33.
 3. *Constitutional and statutory provisions with reference to alienation of the homestead; to what, apply.*—The constitutional requirements, and statutes passed to carry it into effect, as to the alienation of the homestead, apply to cases where the owner thereof is a married man, and do not affect a homestead in lands of the statutory estate of the wife, which husband and wife have conveyed in the manner requisite to pass her title to such lands.—*Weiner v. Sterling*, 98.
 4. *Homestead; wife's consent to alienation of; what sufficient.*—The constitutional requirement as to the alienation of the homestead, owned by a married man, is satisfied, if the wife gives her "voluntary signature and assent" to the husband's conveyance, though she is not named as a grantor therein, and does not in terms convey anything.—*Dooley et al. v. Villalonga*, 129.
 5. *Same.*—Though the husband alone bargains, sells, and conveys, as grantor in a mortgage, yet if the power of sale therein proceeds from both husband and wife, and vests the mortgagee with full power to sell the lands in default of payment, &c., and the wife voluntarily signs and assents to the conveyance,—this is a compliance with the constitution, and will pass title to a homestead owned by the husband.—*Ib.* 129.
 6. *Homestead exemption of lot in city; what essential to.*—The constitution of 1868 exempted a homestead in a city, town or village, from liability to seizure on legal process, only where the lot and appurtenances did not exceed two thousand dollars in value; and the limitations as to quantity and value not existing, there was no exemption from payment of debts, and no constitutional restraint as to alienation.—*Garner v. Bond*, 85.
 7. *Constitution of 1868; effect of, as to power to amend charter.*—The act to constitute the purchasers of any railroad, &c., a body politic and corporate, having been enacted, since article thirteen of the constitution of 1868, became operative, and it, and similar provisions in the present constitution providing that the general laws, under which corporations may be framed, may be amended, altered or repealed, corporations thus formed are subject to legislative control.—*M. & M. Railway Co. v. Steiner, McGehee & Co.*, 560.
 8. *Judge; when disqualified.*—A judge related, within the fourth degree of affinity or consanguinity to the slain, is incompetent to try one charged with the murder.—*Gill v. State*, 169.
 9. *Constitution, article 6, section 18 of, construed.*—Such relationship, though not falling within the letter of section 540 of the Code, which disqualifies on account of relationship to the parties, is a "legal cause" at common law, and also under article 6, section 18 of the constitution, which renders the judge incompetent, and authorizes the prisoner and the solicitor to agree upon a special judge, and in default of such agreement, an appointment by the clerk.—*Ib.* 169.

CODE.

See STATUTE.

COSTS.

1. *Costs; liability of State or county for.*—Neither the State nor the several counties thereof, are liable for costs incurred in the prosecution of offenders against the laws, except to the extent, and in the manner, provided by statute.—*Greene County v. Hale County*, 72.
2. *Code of 1876, section 4917 construed.*—Under the provisions of the Code (§ 4917) when a prosecution begun in one county, is transferred by change of venue to another county, "all fines and forfeitures go to the county in which the indictment was found, and judgment must be rendered accordingly; and the fees of all jurors and witnesses, on being properly certified by the clerk of the court to which the trial is removed, are a charge on the county in which the indictment was found, in like manner as if the trial had not been removed.—*Ib.* 72.
3. *Same.*—Under this section, fees of persons summoned as special jurors, for the trial of an indictment which had been transferred on a change of venue, when properly certified, are payable by the county in which the indictment was found, and not by the county to whose courts the trial was transferred; and if the latter county pays them, it is a voluntary payment, which will not constitute it a creditor of the county in which the indictment was found.—*Ib.* 72.
4. *Costs, execution for, against obligors on injunction bond; when register may issue.*—Under our statutes, in all cases where an injunction has been obtained, and costs decreed against the complainant on its dissolution, the register may, without a reference or further order of the court, issue execution for costs, against any or all of the parties to the injunction bond.—*Ib.* 72.
5. *Costs in criminal cases.*—The court adverts to the excessive penalties which some times arise under the law authorizing offenders to be put to work for payment of costs of conviction, at the rate of not exceeding forty cents per day, and expresses the hope that the matter will undergo early legislative correction.—*McDowell v. State*, 172.

CONTRACT.

1. *Contract; what illegal.*—It is settled, beyond further controversy in this court, that a contract made here during the late war, for the sale of property which the vendor knew the purchaser was buying, to enable him to furnish material to the Confederate States, to aid in the prosecution of hostilities against the United States, is void, and can not now be enforced.—*Ware v. Jones*, 288.
2. *Same.*—There is no difference in principle between such a sale when made directly to the Confederate States, or its agent, and a sale made to an individual who, it was known, expected to profit by it in making contracts with the Confederate States.—*Ib.* 288.
3. *Illegality of consideration; how must be proved.*—Illegality of consideration will not be inferred, when the evidence can reasonably and justly be reconciled with the hypothesis of legality, and he who asserts it, must prove it; but he need not remove all reasonable doubt, as in criminal cases, and it will be sufficient if it produces the degree of conviction essential in civil cases.—*Ib.* 288.
4. *Parties in pari delicto.*—The law does not look with favor or disfavor, as between the parties, upon either party to a contract made in violation of law or public policy, but declares them *in pari delicto*, and abstains from all interference between them.—*Ib.* 288.
5. *Contracts; what illegal.*—All contracts encouraging prostitution, or auxiliary to the keeping of a bawdy house, are void, and the aid of the courts can not be invoked to enforce or rescind them; the principle, however, is confined to the illegal act, or to the original contract, and is not extended to subsequent, new and independent transactions, founded on a new consideration, not a part of the original scheme, though between the same parties and having relation to the same property.—*Lea, Adm'r, v. Cassen*, 312.

CONTRACT—*Continued.*

6. *Illegal contract; right of parties to rescind.*—Parties to a void and illegal contract may rescind it, and place themselves in *statu quo*, no other consideration being necessary than their mutual agreement; and when it is agreed that money paid under the rescinded contract should be restored, an action to recover it back can be maintained upon the agreement of rescission, which is a new and independent agreement, founded on a new consideration, removed from and not a part of the original transaction, and unaffected by its illegality.—*Ib.* 312.
7. *Written contract; how can not be varied.*—The writings by which a contract is evidenced, in the absence of fraud or mistake in their execution, or any subsequent modification of the contract, are its sole expositors, and can no more be varied, contradicted, or explained by parol, in equity than at law.
8. *Promise; what sufficient consideration for.*—A promise to pay the debt of another, will not support an action, unless founded on a precedent liability or a new consideration; but when, however, by the arrangement between the creditor and the promissor, the original debtor is discharged, and a new debt is created binding on the promissor alone, the promise, whether verbal or written, is supported by a valuable consideration.—*Underwood v. Lovelace*, 155.

See VENDOR AND PURCHASER,
INSURANCE.
SURETY.

CONTRIBUTION.

See SURETIES.

CONVEYANCES.

See DEEDS.

CORPORATIONS.

1. *Corporate existence; when can not be denied.*—In general, whoever contracts with a corporation, in the use of corporate powers and franchises, and within the scope of such powers, is estopped from denying the corporate existence, or inquiring into the regularity of the corporate organization, when an enforcement of the contract, or a right arising under it, is sought.—*Pond & Cahall v. Mutual Building Ass'n*, 232.
2. *General incorporation laws construed.*—The general incorporation laws in force in September, 1871, authorized the formation of a corporation "purchase, hold and convey real estate; to loan money thereon to the members of the association for building purposes," &c.; and the declaratory act of March 3d, 1870, with reference to building and loan associations, did not abridge the capacity conferred on them, when incorporated under the general law, of taking, holding, disposing of or conveying, by lease or fee, real estate so far as limited by its charter, or as its business might require.—*Ib.* 232.
3. *Same; effect of "An act supplementary to the corporation laws of Alabama," approved Nov. 18th, 1868.*—The "act supplementary to the corporation laws of Alabama," approved November 18th, 1868, necessarily repealed all former statutes for the formation of corporations under general laws; and after its passage every original application or declaration for incorporation, was required to be filed in the office of the Secretary of State; and a copy duly certified by that officer, is legal evidence of the incorporation.—*Ib.* 232.
4. *Stockholder; when can not withdraw subscription, or deny corporate existence.*—A subscriber to the capital stock of a bank incorporated by act of the legislature, (which makes the stock a fund pledged for the security of depositors,) upon condition that certain amendments shall be procured from the legislature, and who does not participate actively in an organization then made by the subscribers, with a view

CORPORATIONS—*Continued.*

to the more easy attainment of the desired amendment, but after the failure to obtain it, pays up a portion of the subscription taking a receipt purporting to be the act of the bank, and signed by the cashier, for so much paid on the subscription, and makes no objection to the subsequent carrying on of business by the bank, though it was done with his knowledge, must be regarded as yielding assent to the provisions of the charter, and acquiescing in the organization, and can not withdraw such assent, to the prejudice of a depositor whose rights had already attached, nor to the prejudice of the corporation through whom the right may be enforced, after judgment, by garnishment; and besides, having dealt and contracted with the corporation as such, such subscriber is estopped to deny its corporate existence.—*Lehman, Durr & Co. v. Warner*, 455.

5. *Usurpation of franchise; who can not complain of.*—Whenever there is a legislative grant, under which corporate existence and power claimed could be rightly exercised, no private individual can intervene in a collateral proceeding to complain of a breach of the conditions of the grant, or a usurpation of such franchises. The State which alone can create, may waive the breach or acquiesce in the usurpation, and the wrong being to the State, and not to the individuals, so long as the State remains inactive, the individual must also acquiesce.—*Ib.* 455.
6. *Same.*—The failure of a corporation to organize for more than two years after its incorporation, or to procure and have paid up the minimum amount of capital stock prescribed, before it was authorized to exercise corporate powers, is a wrong to the State, in which it may acquiesce or which it may waive, and the State remaining inactive, a private individual can not complain; and the corporation itself incurs all its liabilities and is estopped from denying them.—*Ib.* 455.
7. *Corporation; action against, for torts.*—A corporation is civilly liable for torts, or for acts and negligence of its servants or agents while in its employment, to the same extent and under the same circumstances as a natural person; the only limitation being, that it is not liable civilly or criminally for torts, of which malice is an essential ingredient.—*South & North Ala. R. R. Co. v. Chappell*, 527.
8. *Same.*—It is not necessary to fix the liability, that the wrongful act or the negligence from which the injury proceeds, should have been committed while the corporation was in the exercise of powers conferred by the charter; it may have been committed while the corporation, or its servants acting under its authority, were exceeding corporate power, or engaged in transactions wholly foreign to its nature.—*Ib.*
9. *Corporation; what duty owes employes, in selection of fellow-servants.* A railroad corporation owes a duty to its employes, to exercise due care and diligence in the selection and appointment of their fellow-servants, and is answerable for injuries resulting from its want of care or skill, in these respects; though if these have been observed, it is not responsible to one servant, for injuries resulting from the negligence of his fellow-servant.—*Tyson v. S. & N. A. R. Co.*, 554.
10. *Same; delegation of power of appointment, effect of.*—Whoever exercises the power of appointing and removing employes or servants, though his grade of employment as to other matters, makes him their fellow-servant, exercises a corporate function; and though he be ever so competent himself, and due care has been exercised in selecting him for that purpose, his negligence or mistakes in selecting employes, are the negligence or mistakes of the corporation, for which it must answer.—*Ib.* 554.
11. *Imposition of penalty; when not invasion of chartered rights.*—Where a law when a corporation is formed, or which it afterwards accepted, exacts certain duties of it, a subsequent statute imposing a penalty,

CORPORATIONS—*Continued.*

where none existed before, for a failure to perform such duties, does not impair any corporate right or otherwise violate the constitution. *M. & M. R'y Co. v. Steiner, McGehee & Co.* 559.

See RAILROADS.

COUNTIES.

See COSTS.

CRIMINAL LAW.

ABUSIVE AND VULGAR LANGUAGE.

1. *Code, section 4203 of; construed.*—The statute against the use of abusive, vulgar, or insulting language, (Code, § 4203,) is not violated, unless such language is used at a place, and in the presence of the persons, or some one of them, specially mentioned in the statute.—*Ivey v. State*, 58.
2. "*Curtilage*," as used in this statute; meaning of.—The "*curtilage*," within the meaning of this statute, includes the yard, garden or field, which is near to and used in connection with the dwelling, though not enclosed.—*Ib.* 58.

ACQUITTAL.

See VERDICT, JUDGMENT AND SENTENCE.

APPEAL.

See REVISION OF JUDGMENT, under this Title.

CHARGE OF COURT.

3. *Charge; when properly refused.*—A charge based on a state of facts, of which there is no evidence, is abstract, and properly refused.—*Bain v. State*, 75.
4. *Same; what erroneous.*—A charge given by the court, of its own motion, which authorizes a conviction, though the offense was not committed within the county, and within the period prescribed as a bar to the prosecution, is erroneous, and compels a reversal.—*Ib.*
5. *Same; when not error to refuse.*—Where the offense charged includes a lesser, value being a material element of the higher offense only, a charge so worded as to lead to an acquittal entirely, upon a reasonable doubt as to value, is properly refused.—*Hudson v. State*, 334.
6. *Larceny; corpus delicti, charges as to, what erroneous.*—It is not indispensably necessary to establish the *corpus delicti* in larceny, where there is no direct proof of the felonious taking of goods, found in the recent and unexplained possession of defendants, and forming part of a stock of merchandise, which might have been disposed of in due course of business by the proprietor of the store, or any one of several of his clerks, that all those having authority to dispose of the goods should be called and testify severally, that they had not disposed of them. A charge in such a case, which is so worded, as to lead the jury to infer that it was the duty of the prosecution to make positive proof, that neither the proprietor nor his clerks sold the goods, before the defendants could be convicted, is misleading, and properly refused on that account.—*Roberts and Williams v. State*, 401.

CORPUS DELICTI.

See EVIDENCE, under this Title.

DISCHARGE.

See VERDICT, JUDGMENT AND SENTENCE, under this Title.

CRIMINAL LAW—*Continued.*

ELECTION.

7. *Election by prosecution; what does not amount to.*—The introduction of a witness who testified to seeing the defendant commit a larceny on three successive days, she being alone on the first two occasions, but present with her son on the last, is not of itself, in the absence of any attempt on the part of the State to particularize or identify either of the offenses, an election to proceed for a conviction on either of the larcenies committed in the son's absence.—*Peacher v. State*, 22.

EVIDENCE.

8. *Evidence; what relevant in proof of motive, &c.*—Where an offense is committed against the person or property, the relations existing between the accused and the injured person, or acts or declarations of the prisoner, manifesting unfriendliness or hostility, at and prior to the commission of the offense, are relevant evidence, in connection with the other facts and circumstances, as tending to connect the prisoner with the offense.—*Hudson v. State*, 334.
9. *Same.*—Thus, on trial of an indictment for arson of the prosecutor's mill, it may be shown that the prisoner had had prior difficulties with the owner; that he and others had prosecuted the mill owner for a nuisance, and remarked that some of those engaged in the prosecution would yet burn the mill.—*Ib.* 334.
10. *Same; effect and weight of.*—The jury must determine, in view of all the facts and circumstances of the particular case, what weight such evidence should have; and though the time elapsing between the formation of the hostile relations, or acts manifesting it, and the commission of the offense, may greatly weaken the evidence, it does not render it inadmissible.—*Ib.* 334.
11. *Same; what evidence irrelevant.*—A defendant who has been allowed to show that others stood in the same relation as himself towards the prosecutor, and had the same motive to commit the offense, can not complain that he was not permitted to show who such other persons were.—*Ib.* 334.
12. *Evidence; what irrelevant.*—Where the quarrel arose about taking planks out of deceased's porch by defendant, and the latter when deceased asked why it was done, replied in an angry and threatening manner, without giving any reason for his act, leaving deceased entirely uninformed as to the reason, after which they separated, and defendant, about an hour afterwards, meeting deceased, without any subsequent altercation between them, or mutual blows, struck the fatal blow,—proof that defendant removed the plank by direction of the common superior of himself and deceased, having no tendency to influence the conduct of the deceased, or to justify or mitigate the act charged against the prisoner, is inadmissible.—*Steele v. State*, 213.
13. *Larceny; corpus delicti, how proved.*—It is not indispensably necessary to establish the *corpus delicti* in larceny, where there is no direct proof of the felonious taking of goods, found in the recent and unexplained possession of defendants, and forming part of a stock of merchandise, which might have been disposed of in due course of business by the proprietor of the store or any one of several of his clerks, that all those having authority to dispose of the goods should be called and testify severally, that they had not disposed of them.—*Roberts and Williams v. State*, 401.
14. *Same.*—In such a case, the testimony of the clerks introduced as witnesses, and suspicious circumstances connected with the possession, may authorize the jury to find that the goods were stolen; though until that fact is found, the defendants are not called on to explain their possession.—*Ib.* 400.
15. *Corpus delicti; what sufficient proof of.*—Appellant was on trial for the

CRIMINAL LAW—*Continued.*

larceny of a hog. The hog alleged to have been stolen was, with a number of others, kept in a lot, and disappeared during the absence of the owner, without breaking the enclosure. Evidence was introduced tending to show that the defendant and his wife had in their possession, about the time the hog disappeared, a large piece of meat and portions of the body of a hog which in size and color of the hair corresponded with that which might have been obtained from the hog that was gone; that this meat was, after being discovered, put away and concealed by the defendant's wife, and that there was prevarication on the part of the defendant and his wife in regard to the meat. After the defendant had examined several witnesses in his behalf, he moved the court to discharge him, on the ground that the *corpus delicti* had not been proved,—*held*: That the court rightly overruled the motion, and allowed the jury to pass on the evidence.—*Colquitt v. State*, 48.

16. *Age of witness; what evidence of admissible.*—A witness may testify to his own age, though he states that his knowledge is derived from what his mother told him; and the fact that his mother, who was not shown to be dead, or out of the jurisdiction of the court, was not introduced, does not affect the admissibility of the evidence, though the jury may consider it, with the other circumstances of the case, in determining its credibility.—*Bain v. State*, 76.
17. *Proof of handwriting; what evidence not admissible.*—It is error to allow a witness, who confesses having written the forged instrument under the direction and at the request of the prisoner, to write in the presence of the court and jury a similar instrument, for the purpose of comparison between the two, or to sustain such witness, when impeached.—*Williams v. State*, 33.
18. *Res-gestæ; what not part of, and inadmissible in favor of prisoner.* The fact that the prisoner an hour after the difficulty, in which he struck the fatal blow, made complaint of being hurt himself, or that he next day made an affidavit or complaint before a magistrate, against the deceased, is no part of the *res-gestæ*, and is inadmissible on the prisoner's behalf, when tried for murder.—*Steele v. State*, 213.
19. *Expert, opinion of; when admissible.*—A physician and surgeon of "long experience with gun-shot wounds, and an expert in such matters," who saw the body of the deceased shortly after she received a wound, may give his opinion as to how it was inflicted.—*Rash v. State*, 89.
20. *Same.*—One who had been in the late war, and "saw the range of balls in a good many gun-shot wounds, but was not a physician, or a surgeon, or an expert," can not be permitted to testify as to "how the balls range, and some of the wounds which the witness had seen." *Ib.* 89.
21. *Same.*—A medical man, though not personally cognizant of the facts, may give his opinion as to the result of a wound or the cause of death, upon the facts proved on the trial; but where the facts are disputed, he can not give his opinion on the case on trial, but must be examined hypothetically, and his opinion on the state of facts which the jury regard as proved, then becomes evidence.—*Page v. State*, 16.
22. *Variance; when fatal to conviction.*—The names of the parties to a judicial proceeding, in which the false oath was taken, must be correctly stated, that the proceedings may be accurately identified; and if not correctly stated, the variance is fatal—as where the suit described in the indictment was against *Cobbs*, and that of which the evidence was given was against *Cobb*.—*Jacobs v. State*, 448.
23. *Variance; what does not constitute.*—The mere mis-spelling in the indictment of the name of the injured person, is immaterial, if the pronunciation of the name proved is satisfied by the manner in which it

CRIMINAL LAW—*Continued.*

is written—*e. g.*—as where the name is spelled *P-r-e-y-e-r*, and pronounced as if written *Preyer* or *Prior*.—*Page v. State*, 17.

EXCEPTION.

See REVISION OF JUDGMENT, under this Title.

FORGERY.

24. *Forgery; what subject of.*—A writing in words and figures as follows: "Uniontown, August 23, 1878. Mr. Cohen.—Please send me ten dollars, and I will sell some cotton next *weak* and pay you the money back. Henry Goldmon," may be the subject of forgery.—*Williams v. State*, 33.

FRAUDULENT PACKING OF COTTON.

25. *Fraudulent packing of cotton; what not necessary to constitute offense denounced by section 4398 of Code.*—To constitute the statutory offense of fraudulently packing or baling cotton (Code, § 4398) it is not essential that the sand or other worthless foreign substance, fraudulently baled or packed with the cotton, should be put into the interior of the bale and concealed by surrounding or plating with clean cotton, so as not to be detected by the ordinary modes of sampling; nor does it matter whether such worthless foreign substance is put in the cotton while in the gin-house, or at the press while the cotton is being packed in bales.—*Daniel et al. v. State*, 4.

GAMING.

26. *"Table for gaming;" what constitutes.*—Any table kept and used for gaming is "a table for gaming," within the meaning of the statute (Code, § 4208); though it has no peculiar devices or appliances, and is not necessarily used in playing any particular game.—*Toney v. State*, 1.

HARD LABOR.

See VERDICT, JUDGMENT and SENTENCE, under this Title.

HOMICIDE.

See EVIDENCE 12, under this Title.

INDICTMENT.

27. *Sufficiency of indictment.*—An indictment for larceny of a hog, not alleging any value, can be upheld only under the act of February 20, 1875, which makes the stealing of such an animal a felony, without regard to value; and a general verdict of guilty on such an indictment authorizes sentence for grand larceny.—*McDowell v. State*, 172.
28. *Same.*—Although our statute has dispensed with many of the allegations necessary in a common law indictment for perjury, it still requires, in addition to the general averment of authority to administer the oath, that the indictment should set forth the substance of the proceedings, that it may distinctly appear that the oath was taken on an occasion, in reference to a matter, and before an officer, or court, having authority to administer it; an indictment not setting out enough of the proceedings to disclose these facts, is insufficient; so, also, if it sets out the proceedings, and does not disclose that the oath was lawfully taken.—*Jacobs v. State*, 282.
29. *Same.*—In robbery, where the indictment describes the property taken from the person as "thirty dollars in greenbacks, national bank-notes, gold or silver coin of the United States," the property of a specified third person, it must be construed as a charge of taking "dollars of greenbacks, or national bank-notes, or gold or silver coin of the United States," and if the taking of any one of these things should

CRIMINAL LAW—*Continued.*

- not amount to robbery, the indictment would be bad.—*Wesley v. State*, 282.
30. *Code, section 4130 of; indictment under, when sufficient.*—The offense defined in section 4130 of the Code has three main ingredients; first, a prisoner confined under a lawful charge or conviction of felony; second, the conveying into the jail, &c., of some disguise or instrument useful to aid the escape; and third, the intent thereby to facilitate the escape of such prisoner; and an indictment charging the offense substantially in the language of the statute is sufficient, though it does not aver that the defendant knew the prisoner was confined on a charge of felony.—*Wilson v. State*, 151.
31. *Indictment; what insufficient.*—An indictment which merely charges a sale of vinous or spirituous liquor, without license and contrary to law, &c., is insufficient as to cases falling under sections 4204 and 4274 of the Code of 1876; in this one case it is necessary to aver that the liquor was drank about the premises, and in the other, that the accused "did engage in or carry on the business," &c.—*Ulmer v. State*, 208.
32. *Same.*—An indictment which charges merely that the defendant engaged in or carried on the business of a wholesale liquor dealer at a specified place, against the peace, &c., is fatally defective; to constitute a charge for violation of the revenue law, it should aver that the business was carried on without license.—*Koopman v. State*, 70.
33. *Same; what indictment sufficient, since act of December 3d, 1878.* Since the enactment of December 3d, 1878, it would seem that the form of indictment pursued in this case is sufficient, in cases where a retailer sells vinous or spirituous liquor, of any kind, in any quantity less than one quart, or in any quantity, if the same, or any portion thereof, is drank on or about his premises. It has no reference to offenses by licensed retailers, or to the offenses defined in sections 4205 and 4206.—*Ulmer v. State*, 208.
34. *Offense; how must be charged.*—Where a statute creating an offense, declares that it may be committed by certain specified acts or means, or by other generic acts or means which are not described, an indictment under the statute for an act other than those particularized, or charging such acts in the alternative with the acts specified in the statute, must charge the acts which the statute does not specially define, in unambiguous words belonging to the plain and proper language of the country, and not in slang words or vulgarisms, or words used in a technical sense in some peculiar employment or business.—*Daniel et al. v. State*, 4.
35. *"Sand-packing," use of term in indictment, does not render it ambiguous.*—In view of the general concern of the people of the State in raising cotton, preparing it for market, and selling and purchasing it, the words "sand-packing" have become so generally understood among the people, that they can not be said to be ambiguous or merely technical; and the use of these words in an indictment for the false packing of cotton, will not render it ambiguous, or insufficient.—*Ib.* 5.
36. *Fraudulent intent; what sufficient averment of.*—When the intent to defraud or injure is an ingredient of an offense, the indictment may aver it generally.—*Williams v. State*, 33.
37. *Greenbacks.*—The term "greenbacks" is a slang word, and by itself, without connection with something else indicating the notes called by that name, is not a proper denomination for them in an indictment; but in robbery, the kind and value of the property so taken, is immaterial so long as it is of any value; and "greenbacks," designated in the indictment as "thirty dollars of greenbacks," having been ascertained by the verdict to be the property of the prosecutor, and feloniously taken from his person by violence,—the court properly passed sentence on the verdict.—*Wesley v. State*, 282.

CRIMINAL LAW—*Continued.*

INTENT.

38. *Illegal act; presumptions as to intent to commit.*—Whenever one does an act which is in itself illegal, the law presumes the intent to do that act, and the act itself is evidence of the intent; hence where one sells or gives spirituous liquors, &c., to a minor, &c., without the requisition of a physician, the gift or sale is evidence of the intention, and there can be no inquiry as to whether the defendant had the “*specific intent*” to violate the law.—*Bain v. State*, 76.

JEOPARDY.

See VERDICT, JUDGMENT AND SENTENCE, 43, under this title; also, JURIES AND JURORS, 54.

JUDGMENT, VERDICT AND SENTENCE.

39. *Arrest of judgment; what not ground for.*—Judgment will not be arrested, because the christian name of the owner of the stolen property was designated by initials only, instead of being given in full; especially where the prosecutor wrote his name as set forth in the indictment, and was as well known when designated in that way, as when his christian name was given in full.—*Lyon v. State*, 224.
40. *Arrest of judgment; what not grounds of motion for.*—It is not ground of motion in arrest of judgment, on a general verdict of guilty upon an indictment in the Code form, not specifying the particular time of the commission of the offense,—that it is not affirmatively shown by the record, whether the conviction was for an act committed before or after the passage of a statute, which punished as a felony, an act which before was only a misdemeanor; it must be presumed, in the absence of a bill of exceptions showing the contrary, that the judgment which the evidence demanded was rendered.—*McDowell v. State*, 30.
41. *Verdict of guilty as to one count; effect of.*—A verdict finding the defendants guilty on a particular count of the indictment, operates as an acquittal as to the other counts.—*Walker v. State*, 30.
42. *Nolle prosequi; effect of entry of, as to one count.*—An entry of *nolle pros.* as to one of several counts of an indictment, before the defendant is put in jeopardy by the empanneling and swearing of the jury for his trial, does not effect his acquittal of the count, but merely destroys that count, leaving the indictment as though the count had never been in it.—*Ib.* 30.
43. *Same.*—Several persons were jointly indicted, in an indictment containing two counts, the first charging arson in the first degree, and the other in the second. When the case was called for trial four of the defendants appeared, and by leave of the court, the “State entered a *nolle pros.* as to the first count of the indictment; and the defendants pleaded guilty as to the remaining counts, and were sentenced accordingly.” At another term, the remaining defendants went to trial on the indictment, on a plea of not guilty, and the jury returned a verdict of guilty as charged in the first count,—*held*: The entry of the *nolle pros.* put an end to the first count as to all the defendants, leaving the indictment as though it had originally contained only the second count; and having been in jeopardy as to the second count, the defendants could not be again tried for that offense; but the first count having been put out of the indictment, there was nothing in it to authorize a verdict of guilty on that count; and though the jury found a verdict of guilty of that offense, the defendants were never in jeopardy under that charge, and could be again indicted and tried for arson in the first degree.—*Ib.* 30.
44. *Discharge; when prisoner not entitled to.*—When a demurrer is sustained to an indictment, or it is quashed or otherwise vacated, the discharge of the prisoner does not necessarily follow; but the court in the exercise of the authority which inheres in it, without the aid of

CRIMINAL LAW—*Continued.*

statutes, may, if it deem it proper, hold the accused to answer a new indictment, without hearing testimony, or calling witnesses to show his guilt.—*Ex parte Graves et al.*, 381.

45. *Hard labor for county; when may be imposed.*—The court traces the origin of section 4296 of the Code of 1876, which authorizes the imposition of hard labor for the county for not less than *ten* years on conviction of murder in the second degree, and also of § 4450 of the same Code, which requires that “in all cases where the period of imprisonment or hard labor is for more than *two* years, the sentence must be imprisonment in the penitentiary; and as the act from which the provisions of section 4450 was taken, was passed long after the statute incorporated in section 4596, and necessarily repealed inconsistent provisions of the Code and laws existing at its passage, full effect must be given to section 4450; and the result is, that the words “*or sentenced to hard labor for the county*,” are stricken out of section 4296 of the Code, and all other of its provisions, which fix as punishment for crime, imprisonment or hard labor for the county, for a longer period than two years.—*Steele v. State*, 213.

JURIES AND JURORS.

46. *Venire; what not good ground of objection to.*—A mistake in writing out in the list served on the prisoner, the surname of one of the jurors specially summoned for the trial of a capital felony, is not ground for quashing the venire, or stopping the trial; such name should be discarded and another juror summoned.—*Rush v. State*, 89.
47. *Challenge to juror; when right of, waived.*—After jurors have been accepted and sworn, it is too late to enter into further inquiry as to their qualifications, or to challenge any of them.—*Ib.* 89.
48. *Service of list of jurors on prisoner; presumption as to.*—In the absence of anything showing the contrary in the record, and of any question made in the court below, it will be presumed that the list of names of persons summoned as jurors for the trial of a capital felony, was duly served upon the prisoner as required by law.—*Ib.* 89.
49. *Juror; presumption as to qualification of.*—Where the name of a person was drawn, whereupon he was accepted as a juror, and the defendant, his peremptory challenges having been exhausted, did not object, it must be presumed, the record being silent on the subject, that the juror possessed proper qualifications.—*Ib.* 89.
50. *Venire; what not ground for quashing.*—It is not ground for quashing the venire summoned for the trial of a capital offense, that it included the names of two of the regular jurors for the week, who, on a previous day, had convicted prisoner's co-defendant, as to whom there had been a severance; such persons may be challenged for cause.—*Wesley v. State*, 282.
51. *Challenge for cause; what not ground of, by prisoner.*—It is not ground of challenge by the prisoner, that a juror has a fixed opinion against capital or penitentiary punishment; neither can the prisoner complain of the action of the State in waiving such cause of challenge.—*Ib.* 282.
52. *Grand jury; objection to organization of, when may be raised for first time in appellate court.*—Our statutes specifically prescribe the mode of organizing grand juries; and whenever the records of a court affirmatively disclose that a body of men has been organized as a grand jury in violation of these statutes, all the acts of such body must be held void; and no laches of the accused will cure the irregularity.—*Finley v. State*, 201.
53. *Grand jury, organization of; what illegal.*—The statute specifically defining how a deficiency in the panel of grand jurors shall be filled, and by whom this must be done, and what order the court must make, any order which confines the sheriff in summoning grand jurors to a

CRIMINAL LAW—*Continued.*

portion only of the persons from whom the statute declares such jurors shall be drawn, or the effect of which, directly or indirectly, is the assumption of the duties required of him,—as where upon deficiency in the panel, “by order of the court a sufficient number of names, to complete the grand jury, from the by-standers in the courtroom, were placed upon slips and regularly drawn,” and the jury thus completed—is illegal; and the body of men thus organized, does not become a lawful grand jury.—*Ib.* 201.

54. *Jeopardy; when does not arise.*—An indictment found by such a body of men being of no legal validity, no jeopardy arises on a trial under it.—*Ib.* 201.

LARCENY.

55. *Larceny of part of outstanding crop; proof, what necessary to constitute.* One hired to pick cotton, who after gathering it converts it to his own use, can not be convicted of the statutory offense of “larceny of part of outstanding crop,” unless at the time of gathering it, he had the present felonious intent to steal it; and where he had the right to retain possession, until the cotton was weighed at the close of the day, the mere fact that after picking the cotton he secreted it, will not of itself justify the finding that he had the felonious intent to steal it, at the time he was picking it.—*Lyon v. State*, 224.

LOTTERY.

56. *“Tuskaloosa Scientific and Art Association,” charter of; does not authorize lottery.*—The charter of the “Tuskaloosa Scientific and Art Association,” &c., approved February 3d, 1866, construed, and the conclusion declared that it does not authorize a lottery on the numerical or combination plan; or on any other plan where money or its equivalent is offered or distributed as premiums.—*Boyd v. State*, 177.

PERJURY.

57. *Perjury; what necessary to constitute.*—The materiality to the issue or point of inquiry, which is necessary to constitute perjury, is not confined to matters involved in issues of fact formed during the course of the proceedings, or where the affidavit can be used as evidence on the trial of such issues; it is enough, if the matter falsely sworn to, is material to the point of inquiry at the time it is made.—*Jacobs v. State*, 448.
58. *Same; what sufficient to constitute.*—A plaintiff in an action of *detinue*, who is without right or title which will support the action, and who wilfully and corruptly swears falsely to an affidavit of ownership, thereby procuring an order of seizure from the officer issuing the summons, is guilty of legal perjury; such affidavit, though purely cautionary, and incapable of being used as evidence at any subsequent stage of the proceedings, is material to the point of inquiry at the time it was made, and tends to the abuse of the administration of justice. *Ib.* 448.

REVENUE LAW—VIOLATION OF.

59. *Code of 1876, section 4204 et. seq. construed.*—One of the three offenses embraced in section 3618 of the Revised Code was entirely omitted from the Code of 1876. Section 4204 of that Code punishes the sale of vinous or spirituous liquor, without license, in any quantity, when drank about the premises; and the succeeding section punishes a sale, whether with or without a license, to minors or persons of known intemperate habits; but the third offense,—selling vinous or spirituous liquor in any quantity less than a quart,—was entirely omitted; and hence from December 9th, 1877, the date when the Code of 1876 went

CRIMINAL LAW—*Continued.*

into effect, until the statute of December, 30th, 1878, which remedied the defect, there was no law punishing the selling, without license, of vinous or spirituous liquor in any, the smallest quantity, unless it was drank on the premises, or unless the seller "*engaged in, or carried on*" the business without license.—*Ulmer v. State*, 208.

60. *Same; what cases covered by section 4806 of Code of 1876.*—Under section 4806 of the Code, an indictment charging that the defendant "sold vinous or spirituous liquor, without license and contrary to law," &c., is sufficient, when an unlicensed "retailer," sells liquor of any kind in any quantity, if the same is drank on or about his premises, and is also good for violation of any special and local laws; that section, however, applies only to unlicensed retailers that were punishable under the Code of 1876, and is not sufficient in prosecutions under sections 4205 and 4206 of that Code.—*Ib.* 208.
61. *Engaging in or carrying on business, within the meaning of the revenue law.*—One who, without license, engages in the business of selling liquor in quantities of a quart or more, is a wholesale liquor dealer within the meaning of the law, and guilty of a violation of its provisions, though the liquor was kept and sold by way of variety merely, "rather to accommodate regular customers than for profit, and constituted a minor part of a general merchandise business,"—if thereby the dealer intended to reap a profit, directly or indirectly in his business.—*Koopman v. State*, 70.

REVISION OF JUDGMENT.

62. *How judgment in a criminal case may be revised.*—Under the laws now in force, two remedies are available to a defendant for the revision of the judgment of conviction; each of which has a different field of operation.—*Ex parte Knight*, 483.
63. *Same.*—He may obtain such revision, by reserving, in the court of original jurisdiction, a question of law for the consideration of the appellate court, the reservation distinctly appearing of record; when this is done, no further act of the defendant is necessary to suspend the sentence, or to call into action the revisory judgment of this court, which under the statute must take jurisdiction of the whole case, and may reverse not only for error as to the question reserved, but for any other error apparent on the record.—*Ib.* 483.
64. *Same; how reservation must appear.*—In such case, where the question of law reserved arises on the indictment or ruling upon a plea, motion, or the like, the judgment upon which must appear of record, the reservation must be distinctly presented on the record; it is not the office of a bill of exceptions to present such matter.—*Ib.* 483.
65. *Same.*—If the reservation is as to matter not appearing of record, the question must be presented by bill of exceptions, duly taken and signed; and whether the matter is shown by the record, or can be presented only by bill of exceptions, the reservation must be distinctly shown, and must be made at the time of the decision complained of.—*Ib.* 483.
66. *Same; remedy when no question is reserved.*—When no question of law has been reserved, the defendant may obtain a revision of the judgment by common law writ of error. Such writ, however, is grantable only by this court in term time, or by a judge thereof in vacation, and then only for error of law apparent of record; though the writ when granted, operates a suspension of the judgment of conviction.—*Ib.* 483.
67. *Same; what does not amount to reservation.*—Merely excepting to the judgment of conviction, and causing that fact to be recited in the judgment-entry, is not tantamount to the *reservation* of any question for the consideration of the appellate court, and furnishes no predicate for suspension of sentence, or the exercise of jurisdiction by this court under the statute.—*Ib.* 483.

CRIMINAL LAW—*Continued.*

SELLING LIQUOR TO MINORS, &c.

68. *Code, section 4205; construed.*—Under section 4205 of the Code, a sale or gift of liquor to any of the class of persons therein mentioned, is unlawful, unless made “*upon the requisition of a physician for medicinal purposes;*” and this “requisition” must be a verbal or written application or request to the seller by the physician himself.—*Bain v. State*, 76.

TRESPASS TO REALTY.

69. *Trespass to realty; section 4417 of Code construed.*—Section 4417 of the Code, with reference to trespass to realty, makes offenses out of certain acts which were mere civil trespasses at common law, and divides these offenses into two classes.—*Johnson v. State*, 9.
70. *Same.*—The first clause of the section punishes wilful and malicious trespasses on the lands of another, “by cutting down or destroying wood or timber growing thereon, or severing from the freehold any produce thereof,” &c.; and to constitute the offense, the prohibited acts must be done wilfully and maliciously, with malice directed to the owner of the premises—it is not necessary that there should be any *asportavit*, or that the trespass be committed *lucri causa*.—*Ib.* 9.
71. *Same.*—The second clause, providing for the punishment of any one taking or carrying away from the freehold any thing thereto attached, under such circumstances as render the trespass a larceny. if the thing severed and taken away were personal property, was intended to enlarge the operation of the statutes for the suppression of larceny; and to constitute an offense under this branch of the statute, felonious intent, or act done *causa lucri*, is a fundamental inquiry, while malice to owner is not.—*Ib.* 9.

WITNESS.

See EVIDENCE, under this Title.

WRIT OF ERROR.

See REVISION OF JUDGMENT, under this Title.

CUSTOM.

1. *Custom; what not sufficient to show.*—The mere act or habit of a railroad company, in paying for medical services rendered to employes injured in its service, does not necessarily establish a custom of such business; before it can have that effect, it must be shown to have been so generally known, and so well settled, as to raise the presumption that the services were rendered in reference to it.—*M. & M. Railway Co. v. Jay*, 247.

DAMAGES.

1. *Damages against sheriff for failure to pay over money; what motion sufficient to support judgment for.*—The statute prescribes the damages recoverable of a sheriff in a summary proceeding for failure to pay over money collected on execution; and if the motion sets forth the facts with sufficient certainty, it is in effect a motion for the damages also, and will support a judgment awarding them.—*McArthur v. Dane*, 539.

DEED.

1. *Deed; when not self proving.*—Unless a deed is properly recorded within twelve months from its date, it is not self proving under section 2154 of the Code.—*Sharp v. Orme*, 263.
2. *Acknowledgment of deed; what sufficient.*—A literal compliance with the forms prescribed by the statute, for the acknowledgment and pro-

DEED—*Continued.*

- bate of deeds, will not be exacted; it is sufficient if it fairly appears that the statute has been substantially complied with; and in determining this, the certificate or acknowledgment may be read in connection with the deed.—*Ib.* 263.
3. *Same; how may be proved.*—Where a grantor wrote his name to a conveyance, which was not attested, but acknowledged before a justice of the peace, the certificate of acknowledgment operates as a substitute for the attestation of a witness; and where the deed was not recorded within twelve months, the party wishing to introduce it, may, upon showing that the officer is without the jurisdiction of the court, prove his handwriting, and thereby render the deed admissible.—*Ib.* 263.
 4. *Deed, alterations in; presumptions as to.*—Material alterations of a deed after its delivery, can be made operative only by a new attestation or acknowledgment. Where interlineations appear in the handwriting of the grantor, merely curing an imperfect description of the lands, and according with all the purposes and objects of the deed, the fair presumption is, that the interlineations were made before the acknowledgment of execution; and the burden of repelling the presumption, rests on the party asserting the contrary.—*Ib.* 263.
 5. *Same; what alteration not sufficient to avoid.*—An innocent alteration made by the grantor, after the delivery of the deed, to cure his own inadvertence and make the instrument accord with its purposes and objects, will not divest the title which has vested by the deed.—*Ib.*
 6. *Grantee, what sufficient description of.*—The grantee in a deed must be so described that he can be certainly known; but a deed to the heirs of a named deceased person is sufficient and will pass the legal title; for the persons who are to take, can be identified by extrinsic testimony.—*Jones v. Morris*, 518.
 7. *Code; section 2948 of, construed.*—The purpose and scope of section 2948 of the Code, are to dispense with a seal as an essential element of a legal conveyance of lands, and to leave the sufficiency of every written instrument for that purpose, when executed in the prescribed mode, dependent on the intention of the grantor to be collected from the terms of the whole instrument; it was not the intention of the statute to blot out all the common law principles, which, for the security of the titles to real estate, required greater solemnity in the execution of such conveyances, than in the case of mere simple contracts under seal.—*Ib.* 518.
 8. *Same.*—Though a seal is not now essential to a conveyance of the legal estate in lands, the conveyance retains all the operation and effect of a sealed deed at common law, and the estoppel arising at common law out of the recitals or covenants of a sealed instrument, still attaches to the unsealed conveyance, executed according to the requirements of the statute.—*Ib.* 518.
 9. *Same; effect of, as to deed by agent.*—The statute has not changed the common law rule, that a deed executed by an agent, to be valid and binding upon the principal, must, with certainty, appear to be the deed of the principal, and must be made and executed in his name; and since the statute, as at common law, a deed by an agent, which grants and covenants in the name of the agent alone, is not at law a valid execution of the power, and will not pass the legal title; though equities may arise thereby which a court of equity will protect.—*Ib.*
 10. *Conveyance of husband's homestead; requisites of.*—Prior to the act of April 23d, 1873, the husband's conveyance of his homestead, joined in by the wife, and witnessed or acknowledged in the manner requisite to pass the wife's real estate, was sufficient; after the passage of that act, such conveyance would not pass the homestead, unless the requirements of the statute were substantially pursued.—*Cahall & Pond v. Building and Loan Ass'n*, 235.

DEED—Continued.

11. *Same; defective acknowledgment and certificate to wife's assent, how may be cured.*—Where the wife's signature and assent to the conveyance of the homestead have been defectively acknowledged and certified, she may make a new acknowledgment, with the intent to cure the defect, and such acknowledgment, when properly made and certified, will relate back, rights of third persons not intervening, to the date of the original delivery of the conveyance, without any new delivery. *Ib.* 235.
12. *Notary's certificate; how can not be impeached.*—A notary's certificate to such conveyance, in the form prescribed by statute, can not be impeached, without showing that the wife's signature was forged, or that she was subject to duress, or that fraud was practiced on her, with the knowledge of the grantee.—*Ib.* 235.
13. *Homestead exemption; what may be aliened.*—The other conditions concurring, lands of the statutory separate estate of the wife, may be the subject of homestead exemption, and a conveyance of such land in the manner requisite to convey the wife's statutory estate, will pass title thereto, freed from the right of homestead exemption, though the lands constitute the homestead, and there is no separate examination of the wife, apart from the husband, as required by the act of April 3d. 1873.—*Weiner v. Sterling*, 98.

See FRAUDULENT CONVEYANCE.

HUSBAND AND WIFE.

MORTGAGE.

DEFINITION.

See CRIMINAL LAW, 2, 37.

DETINUE.

See ACTION, 13.

DEVISE.

See WILL.

DOWER.

2. *Dower; of what estate wife dowerable.*—The use or equity of which the widow is dowerable, like the legal estate of which she is dowerable, is a use or equity residing in the husband; if there is no legal estate, no use or equity, residing in the husband, the wife is not dowerable.—*King v. King*, 479.
2. *Fraudulent conveyance; when wife can not assail.*—A conveyance to hinder, delay and defraud creditors, is voidable as to them, but valid as to the parties to it; and where by such a conveyance the husband, without intending any fraud on his future wife, divests himself of all estate and use in the lands, nothing is left out of which dower can be carved; and the future wife claiming through him at his death, can not dispute the validity of the conveyance, or have a court of equity engraft any use or trust on the lands, based on the husband's fraud, out of which to carve dower.—*Ib.* 479.

EJECTMENT.

1. *Adverse possession; what not necessary to constitute.*—Color of title is not necessary to constitute an adverse possession, on which the statute of limitations will operate, or which will avoid a conveyance by one out of possession; a *bona fide* claim of title openly asserted as hostile to the true owner, renders the possession adverse.—*Ladd v. Dubroca*, 25.
2. *Same; when commences under tax title.*—If a purchaser at tax sale of lands, enters into possession under the purchase, before the delivery

EJECTMENT—*Continued.*

- of the deed, *bona fide* claiming title, his possession is adverse from its inception, and not merely from the date of the delivery of the deed; though its delivery may be necessary to constitute color of title.—*Ib.* 25.
3. *Same; what does not break continuity of.*—The forcible interruption of possession by a naked trespasser, redressed by legal remedies, can not be set up by him to break the continuity of an adverse possession.—*Ib.* 25.
 4. *Paper title; what dispenses with proof of.*—A mortgagor in possession, pleading in bar of ejectment, by one claiming under a purchaser at the mortgage sale, that after the sale he became tenant of the purchaser, and made him the proper statutory offer and tender for redemption, thereby admits of record that such purchaser then had title, and takes upon himself the onus of showing that he redeemed under the statute.—*Alexander v. Caldwell*, 543.
 5. *Plea of tender; what insufficient.*—Where the purchaser of lands conveyed under the mortgage sale, brings ejectment against the mortgagor, the latter's plea that, before suit was brought, and within the time prescribed by statute, he tendered the amount required to redeem,—the plea not being accompanied by deposit with the clerk of the amount tendered—presents no defense to the action, and should be rejected, on motion.—*Ib.* 543.

See CHANCERY, 8.

ELECTION.

See CRIMINAL LAW, 7.

ENTRY.

See EJECTMENT, 3.

ERROR, WRIT OF.

See CRIMINAL LAW.

ERROR AND APPEAL.

1. *When appeal or writ of error lies.*—Under the laws now in force, two remedies are available to a defendant in a criminal case, for the revision of a judgment of conviction; each of which has a different field of operation.—*Ex parte Knight*, 482.
2. *Same.*—He may obtain such revision, by reserving, in the court of original jurisdiction, a question of law for the consideration of the appellate court, the reservation distinctly appearing of record; when this is done, no further act of the defendant is necessary to suspend the sentence, or to call into action the revisory jurisdiction of this court, which under the statute must take jurisdiction of the whole case, and may reverse not only for error as to the question reserved, but for any other error apparent on the record.—*Ib.* 482.
3. *Same; how reservation must appear.*—In such case, where the question of law reserved arises on the indictment or ruling upon a plea, motion, or the like, the judgment upon which must appear of record, the reservation must be distinctly presented on the record; it is not the office of a bill of exceptions to present such matter.—*Ib.* 482.
4. *Same.*—If the reservation is as to matter not appearing of record, the question must be presented by bill of exceptions, duly taken and signed; and whether the matter is shown by the record, or can be presented only by bill of exceptions, the reservation must be distinctly shown, and must be made at the time of the decision complained of.—*Ib.* 482.
5. *Same; remedy when no question is reserved.*—When no question of law has been reserved, the defendant may obtain a revision of the judgment by common law writ of error. Such writ, however, is grantable

ERROR AND APPEAL—*Continued.*

only by this court in term time, or by a judge thereof in vacation, and then only for error of law apparent of record; though the writ when granted, operates a suspension of the judgment of conviction.—*Ib.* 482.

6. *Same*; what does not amount to a reservation.—Merely excepting to the judgment of conviction, and causing that fact to be recited in the judgment-entry, is not tantamount to the reservation of any question for the consideration of the appellate court, and furnishes no predicate for suspension of sentence, or the exercise of jurisdiction by this court under the statute.—*Ib.* 482.
7. *What not revisable*.—As a general rule, where the loss of a written instrument is sought to be proved, its loss should be shown, before allowing evidence of its contents; but it rests in the sound discretion of the lower court to modify, or change, the rule in a particular case; and the exercise of that discretion is not revisable.—*Conoly v. Gayle*, 116.
8. *Same*.—Allowing a question to be asked, which was not answered, will not support an assignment of error.—*Ib.* 116.
9. *Same*.—It rests within the sound discretion of the court, to allow a party to introduce further evidence, even after the close of the argument; and the exercise of that discretion is not revisable.—*Carter v. Wilson*, 434.
10. *Same*.—As no appeal lies from the refusal of a change of venue, this court will not pass upon the sufficiency of the grounds for the ruling.—*Wesley v. State*, 282.
11. *Same*.—The re-examination of a witness, at the instance of a party who has already introduced and examined him, that he may repeat his testimony, rests within the discretion of the primary court, and the exercise of that discretion is not revisable.—*Newbrick & Bros. v. Dugan*, 254.
12. *Same*.—If rulings upon demurrer do not appear, otherwise than by recitals in the bill of exceptions, they will not be revised on error.—*Carter v. Wilson*, 434.
13. *Error; when not cured or waived*.—There is no statute of this State applicable to criminal proceedings, which after judgment and verdict cures errors not previously objected to; on the contrary, our statute provides, on appeal or writ of error, that no assignment of error is necessary, but the court must render such judgment on the record as the law demands; and under the uniform practice of this court, whatever would have been good ground of motion in arrest of judgment in the court below, though not noticed there, will compel reversal here.—*Finley v. State*, 201.
14. *Motion to dismiss appeal; when too late*.—A motion to dismiss an appeal can not be entertained, after submission of the cause on the merits, without notice to the appellant, and without affording him an opportunity of remedying the defect.—*Thornton v. Moore*, 348.
15. *What not ground of reversal*.—A judgment rendered by the City Court of Selma, the presiding judge determining both law and fact, as required when a jury is waived, will not be reversed, merely because of erroneous ruling on demurrer to defective counts of the complaint filed on appeal from a Justice's Court, if there is one good count, and the judgment is right on all the evidence, which is fully set out in the record.—*Meyer v. W. U. Tel. Co.* 159.
16. *Same*.—If upon the evidence admitted, and that rejected, excluding that to which a party objected, the court could properly have instructed the jury to find against him, and the jury does so find, he can not complain of erroneous rulings on the trial; for all presumption of injury is repelled, and error without injury is not ground for reversal.—*Leu v. Cassen*, 312.
17. *Same*.—A correct judgment will not be reversed, even though a wrong reason may be given for it, *e. g.*, as where the court orders pleas in

ERROR AND APPEAL—*Continued.*

- abatement to be stricken from the file, because not filed in time, and the affidavit and writ of attachment plainly show the falsity of the pleas.—*Mitchell v. Pitts & Henry*, 219.
18. *Same*.—Where the case is such that in no event can the plaintiff recover, erroneous rulings against him, furnish no ground for reversal.—*Alexander v. Caldwell*, 543.
 19. *Same*.—A party can not complain of a charge which favors him, even though it be erroneous.—*Moore, Walshman & Co. v. Parks*, 409.
 20. *Same*.—A general exception to the entire charge of the court, enunciating separable and distinct propositions of law, will be unavailing, if any one of its separate propositions is correct.—*Snow v. Carr*, 363.
 21. *Affirmed judgment; can not be corrected or altered by lower court*.—A judgment of the lower court affirmed on appeal, is merged in the judgment of this court, and can not be altered by the lower court; nor by this court, after the expiration of the term at which it was rendered.—*McArthur v. Done*, 539.
 22. *Supersedeas; when appeal will not operate*.—Under our statutes, an appeal will not suspend execution of the judgment or decree appealed from, unless bond and security be given for that purpose, as specified by the statutes.—*Gas Co. v. Merrick & Sons*, 534.
 23. *Jurisdiction over insolvent estate; what essential to support on direct attack*.—The jurisdiction of the Court of Probate over an estate as insolvent, can not be sustained on error, unless the report and decree of insolvency appear of record; the existence of these facts can not be presumed from recitals in the orders of the court.—*Thornton v. Moore*, 348.

ESTATES OF DECEDENTS.

1. *Claims against insolvent estate; statutes concerning filing of, construed*. The purpose and object of the statute requiring the filing of claims against an insolvent estate, are complied with, when a statement of a claim is filed, which, when taken in connection with the affidavit accompanying it, fairly discloses an existing liability preferred against the estate.—*Thornton v. Moore*, 347.
2. *Same; statutes relating to, construed*.—The administrator of a creditor filed as a claim against an insolvent estate, an attorney's receipt for promissory notes made by the insolvent intestate, which described with particularity, the date, makers and payee, the amount and time of payment of each note, and that each bears interest from date. Appended to this receipt, was the affidavit of administrator, that he believes of his own personal knowledge, that the annexed receipt for claims or notes therein described, for \$2008 and interest, to be counted in favor of "the estate" of which affiant was administrator, against the insolvent estate, "is correct, and that the same is justly due and unpaid."—*held*: This was a substantial compliance with the statute; the affidavit, fairly interpreted, showing that the claim filed was for the notes, and not upon the receipts, in which they were described.—*Ib.* 347.
3. *Defenses, what can not be made, if not presented within twelve months*. Where no objection to the merits of a claim, duly filed against an insolvent estate, is made within twelve months after the declaration of insolvency, all defenses existing or occurring within that period, are barred; but matters subsequently occurring, which are a valid bar to the demand, or which deprive the creditor, in equity and good conscience, of all right to share in the fund, may be made available at any time before rendition of final decree, declaring the amount of the claim and the rateable proportion of assets to which the claimant is entitled.—*Ib.* 347.
4. *Same; mode of objection*.—The proper mode of objecting to a plea, filed more than twelve months after the declaration of insolvency,

ESTATES OF DECEDENTS—*Continued.*

- seeking to make available against a claim matters of defense arising within that time, is a motion to strike from the files.—*Ib.* 347.
5. *Defective verification; when amendable.*—An insufficient verification to a claim, filed within the proper time, against an insolvent estate, is amendable at any time before final decree.—*Ib.* 347.
 6. *Objection to claim against estate; when must be filed.*—The allowance of a claim duly filed against an insolvent estate, is matter of right, unless objections to its merits be filed within twelve months after the declaration of insolvency; and all matters of defense existing within that period and not duly filed, are forever barred.—*Herbert v. Thames*, 340.
 7. *Same.*—Matters subsequently occurring, which are a valid bar to the demand, or which deprive the creditor of all right, in equity and good conscience, to share in the distribution, may be shown at any time before final decree declaring the amount of the claim, and the rateable proportion of assets to which the claimant is entitled.—*Ib.* 340.
 8. *Claim of wife against husband's estate for conversion of statutory estate; what not bar to assertion of.*—Where the husband bought lands with the wife's statutory estate, taking title to himself, and his administrator sells them and collects the proceeds, the wife's pursuit of the funds in his hands as trust money, and compelling their payment to her under decree in chancery, is not inconsistent with her right to hold the estate liable, and no bar to her demand for the balance due, after crediting the amount coerced from the administrator.—*Ib.* 340.
 9. *Transferee; when may appear in behalf of claim.*—Where a claim against an insolvent estate has been transferred, before objection filed to its allowance, the transferee may intervene and become the actor, when issues are formed as to its allowance. (*Overruling, in this respect, Miller v. Parker, 47 Ala. 312.*)—*Thornton v. Moore*, 348.
 10. *Disqualification of presiding judge; to what extends.*—When the judge of probate is a creditor, having a claim filed against an insolvent estate, he becomes incompetent, not only as to that claim, but as to the entire administration; and whatever of judicial duty is to be performed in reference to it, must be performed by the register.—*Ib.* 384.
 11. *Allegation of necessity for sale; what sufficient on collateral attack.* On collateral attack, a petition for sale of decedent's lands for division, &c., which describes the locality and situation of the lands, and avers that they would be unproductive, unless divided into lots and buildings erected thereon, which the estate has no means of paying for, and concludes: "*wherefore it is manifest, said lands can not be equitably divided between the heirs of said estate, unless by a sale of the same,*" &c., is sufficient, in its allegations of the necessity for a sale, to give the court jurisdiction to order the sale.—*Bibb v. Bishop Cobbs Orphans Home*, 326.
 12. *Necessity for sale, ascertainment of; what sufficient on collateral assault.*—An order of sale of lands descended to infants, reciting that "*K., commissioner heretofore appointed to take testimony in this cause, having reported the same, which by order of the court is approved and ordered to be filed among the papers of said estate; and the court proceeded to examine the testimony, and from said testimony it appears to the court that said lands can not be equitably divided among the heirs-at-law, without a sale thereof, and also that it would be more to the interest of the minors to sell said property and reinvest,*" &c., contains enough to show that the necessity for sale was ascertained by proof of disinterested witnesses, taken by deposition as in chancery cases, when the order of sale is attacked collaterally.—*Ib.* 326.

ESTOPPEL.

1. *Purchaser at execution sale; when estopped from asserting invalidity of mortgage.*—One buying lands which the vendor had encumbered by

ESTOPPEL—*Continued.*

mortgage, to secure a debt to a third person, and expressly agreeing with the seller and the mortgagee to pay such debt, which is deducted from the cash payment required, subordinates his title to the mortgage, and is estopped from denying its validity; and the mortgage being duly recorded, a purchaser of the lands at a sale on execution against the vendee, merely succeeds to his rights, and is also bound by the estoppel.—*Kennedy v. Brown*, 296.

2. *Stockholder; when estopped to deny corporate existence.*—A subscriber to the capital stock of a bank incorporated by act of the legislature, (which makes the stock a fund pledged for the security of depositors,) upon condition that certain amendments shall be procured from the legislature, and who does not participate actively in an organization then made by the subscribers, with a view to the more easy attainment of the desired amendment, but after the failure to obtain it, pays up a portion of the subscription taking a receipt purporting to be the act of the bank, and signed by the cashier, for so much paid on the subscription, and makes no objection to the subsequent carrying on of business by the bank, though it was done with his knowledge, must be regarded as yielding assent to the provisions of the charter, and acquiescing in the organization, and can not withdraw such assent, to the prejudice of a depositor whose rights had already attached, nor to the prejudice of the corporation through whom the right may be enforced, after judgment, by garnishment; and besides, having dealt and contracted with the corporation as such, such subscriber is estopped to deny its corporate existence.—*Lehman, Durr & Co. v. Warner*, 455.
3. *Husband, when estopped from asserting invalidity of wife's mortgage of statutory estate.*—Where the wife, with the husband's concurrence, purchases and partly pays for land, and they procure a third person to advance the amount of the deferred payment, which is paid by the wife to the vendor, who conveys to her in terms creating a statutory estate, husband and wife promising at the time to execute a mortgage on such lands to secure the lender, and they afterwards execute a note and mortgage pursuant to the agreement, the instrument containing the statutory words "grant, bargain and sell," and also covenants to "warrant and defend the title" against the "lawful claims of all persons,"—such mortgage is void as to the wife, and can not prejudice her or her heirs; but its covenants estop the husband from denying its validity; and upon the wife's death intestate, the husband surviving, the mortgage will have the effect to pass his life-estate.—*Chapman v. Abraham*, 108.
4. *Estoppel from covenants, &c.*—Though a seal is not now essential to a conveyance of the legal estate in lands, the conveyance retains all the operation and effect of a sealed deed at common law, and the estoppel arising at common law out of the recitals or covenants of a sealed instrument, still attaches to the unsealed conveyance, executed according to the requirements of the statute.—*Jones v. Morris*, 518.
5. *Estoppel as to corporate existence.*—In general, whoever contracts with a corporation, in the use of corporate powers and franchises, and within the scope of such powers, is estopped from denying the corporate existence, or inquiring into the regularity of the corporate organization, when an enforcement of the contract, or a right arising under it, is sought.—*Cahall & Pond v. Building and Loan Ass'n*, 232.

EVIDENCE.

ADMISSIBILITY AND RELEVANCY.

1. *Evidence; admissibility of.*—The identity of a horse, described in a mortgage as an "iron grey colt," being in issue, a witness testified that "he believed the horse [in defendant's possession] was the same ani-

EVIDENCE—*Continued.*

- mal as that described in the mortgage, though he could not state of his own knowledge that it was the same; that the horse had no marks or distinct features whereby he could recognize him from any other grey horse, but he believed he was the same horse described in the mortgage, and was satisfied he was the same,"—*held*: not error to refuse to exclude such testimony, in the absence of proof, by cross-examination or otherwise, that the witness was ignorant of the matter about which he testified, or spoke merely at random.—*Turner v. McFee*, 468.
2. *Same.*—Where the grantor's creditors assail his conveyance for fraud, the fact that at the time of the sale, suits were pending against him, or that he apprehended suits, and other evidence of his general pecuniary condition, is admissible.—*Harrell v. Mitchell*, 271.
 3. *Same.*—Entries upon the tax books, not made by the owner, or under his direction or authority, showing the assessed value of a mill, are not admissible for the purpose of refreshing his memory, as to who returned the property for taxation, or the amount at which it was assessed.—*Hudson v. State*, 324.
 4. *Same.*—In a suit against a corporation for personal injuries, caused by falling into a ditch dug by it in the public highway, its liability depends wholly on its having caused or continued the nuisance, and the plaintiff's suffering the injury without fault on his part; and hence evidence of the care used in selecting a watchman to warn persons approaching the ditch, or his general character or reputation as a watchman, at the time of his employment, are immaterial, and properly excluded.—*S. & N. A. R. R. Co. v. Chappell*, 527.
 5. *Same.*—Where part of the bill, in which complainant asserted facts to be different from what she afterwards alleged them to be, was allowed for the purpose of discrediting her testimony—other portions of the record not touching that question, and shedding no light on the issue, are irrelevant and properly excluded.—*Conoly v. Gayle*, 116.
 6. *Same.*—Where the record of proceedings in another court is legitimate only to show a right to appear and defend the suit, and that has already been conceded, it is not error to rule out such record.—*Ib.* 116.
 7. *Same.*—When the evidence does not show the authority of one professing to be agent of a creditor, for the collection of a claim, transactions between the debtor and such person, or statements by him, not known to the creditor, or afterwards ratified by him, are inadmissible against the creditor; and proof of efforts of the debtor to find such person, and to obtain his deposition, is irrelevant.—*Gallbreath v. Cole*, 140.
 8. *Same.*—A judgment against the executor on a cause of action against the testator, is no evidence of the existence of indebtedness as against the heir or devisee, on bill to subject lands devised or descended; but the rule is otherwise, where the devisee is executor, and the judgment is against him in his representative capacity; for on return of no goods of testator, execution could issue *de bonis propriis*.—*Boykin v. Cook*, 470.
 9. *Same.*—Not only the cost of erecting a mill and placing machinery in it, but also their enhanced value by reason of location, other circumstances, and the general patronage and profits derived from it, may be considered in determining the value of the mill; and a person shown to be conversant with these matters, may give his opinion as to its value.—*Hudson v. State*, 324.
 10. *Proof of execution of instrument; when proof of note contained therein.* Where an instrument is of the character of which registration is authorized and required, to preserve its validity as to *bona fide* purchasers, and at the top is a note or obligation creating the debt it is intended to secure, followed immediately by apt words of conveyance to secure such debt—proof of the execution and recording of the in-

EVIDENCE—*Continued.*

strument, necessarily includes proof of the note, and authorizes its admission without further proof of execution. — *Steiner v. McCull*, 413.

11. *Advances by landlord; what one claiming under, must prove as to.*—In trover by the mortgagee of tenants, against a defendant claiming crops by delivery from the landlord, whose title depended upon having made advances to the tenants, the defendant must make the same measure of proof as to the amount and value of the advances, as would be required of the landlord, if he were suing the tenants; mere proof that the landlord had made advances, without showing the amount or value, will not defeat the mortgagee's action.—*Ib.* 413.

BURDEN AND WEIGHT OF PROOF.

12. *Indicia of fraud; burden of proof.*—Where a *bona fide* creditor shows *indicia* or badges of fraud, the burden rests on the grantee to repel the presumptions they generate; if his ability to pay is questioned, he must show the source or means by which he obtained the money, and that there was a real adequate consideration, actually paid; and whatever there may be, not in the ordinary or usual course of such transaction, should be fully explained.—*Harrell v. Mitchell*, 270.
13. *Same.*—The fact that the son, shortly after receiving a conveyance of lands from an insolvent father, conveys parts of them to each of the other children, without any valuable consideration shown therefor, casts suspicion on the transaction, which can be removed only by clear and convincing evidence of fairness, good faith, and an actual consideration, really paid.—*Ib.* 270.
14. *Illegality of consideration; how must be proved.*—Illegality of consideration will not be inferred, when the evidence can reasonably and justly be reconciled with the hypothesis of legality, and he who asserts it, must prove it; but the evidence need not remove all reasonable doubt, as in criminal cases, but will be sufficient if it produces the degree of conviction essential in civil cases.—*Ware v. Jones*, 288.

ORDER OF INTRODUCTION.

15. *Lost instrument; rule as to proof of contents.*—As a general rule, where the loss of a written instrument is sought to be proved, its loss should be shown, before allowing evidence of its contents; but it rests in the sound discretion of the lower court to modify, or change, the rule in a particular case.—*Conoly v. Gayle*, 116.
16. *Order of introducing evidence, ruling as to; what not erroneous.*—Proponent was a witness, as to the loss of the will, and contestant, on cross-examination, exhibited a copy of a bill in chancery, filed and verified by her prior to that time, which she made affidavit to, knowing it averred that decedent died intestate. By agreement of counsel, it was expressly understood that this copy was to be read in evidence, but contestant declined to do this, until proponent closed her evidence; and thereupon the court, at proponent's instance, required the copy to be read then,—*held*: not error.—*Ib.* 116.

PAROL AND WRITTEN.

17. *Written contract; how can not be varied.*—The writings by which a contract is evidenced, in the absence of fraud or mistake in their execution, or any subsequent modification of the contract, are its sole expositors, and can no more be varied, contradicted, or explained by parol, in equity than at law.—*Winston v. Browning*, 80.
18. *Same; how explained by parol.*—A policy taken out by piano and music dealers, against loss by fire, describing the property as "*their own or held in trust*," will, in the absence of evidence to the contrary, cover a piano left with them for sale or rent; but oral evidence is admissible

EVIDENCE—*Continued.*

to show what goods were intended to be, and were insured under the general words of the policy.—*Snow v. Carr*, 363.

PRESUMPTIONS.

19. *Administrator; additional bond of, liabilities of his sureties on.*—When shortly before the execution of an additional bond, an administrator reported a sale of the lands of the intestate, and that he had received the purchase-money, and thereon asking authority to make a conveyance, and the sale is confirmed, it not being shown that the money was disbursed before the execution of the additional bond, the presumption is, that the money remained in the hands of the administrator at the time of the execution of the additional bond, and the sureties thereon become responsible for its proper application.—*May v. Kelly*, 489.

PRIMARY AND SECONDARY.

20. *Same; what evidence admissible to show contents of.*—In action against the insured for money had and received, by one who claimed that his goods were covered by the policies of insurance, the amount of which the insured had collected, secondary evidence may be given of the contents and terms of the policies, where they have been cancelled, and returned to the insurer in a foreign country.—*Snow v. Carr*, 363.

See CRIMINAL LAW for questions of Evidence arising thereunder.

EXECUTION.

See COSTS, 4.

CHANCERY, 20.

EXECUTORS AND ADMINISTRATORS, 3.

GARNISHMENT, 3, 4.

JUDGMENT AND DECREE.

EXECUTORS AND ADMINISTRATORS.

1. *Judgment against personal representative; when not evidence against heir or devisee.*—A judgment against the executor on a cause of action against the testator, is no evidence of the existence of indebtedness as against the heir or devisee, on bill to subject lands devised or descended; but the rule is otherwise, where the devisee is executor, and the judgment is against him in his representative capacity; for on return of no goods of testator, execution could issue *de bonis propriis*.—*Boykin, Ex'r, v. Cook, Adm'r*, 473.
2. *Judgment; what grossly irregular.*—Judgment to be levied *de bonis propriis*, in a suit against the executor as such, on a cause of action against the testator, is grossly irregular, and is properly amended *nunc pro tunc* at a subsequent term so as to make it *de bonis testatoris*; and the amendment when made will relate back to the date of the original judgment.—*Ib.* 472.
3. *Same; when void.*—A sale of the testator's lands, devised or descended, levied on and sold as his property, under execution so framed as to operate only on the executor personally, and issued on a judgment against him in his representative capacity, and a deed conveying such title as the defendant had as executor in the lands, are utterly inoperative and void.—*Ib.* 472.
4. *Administrator's bond; what necessary to maintain action on, by creditor of decedent.*—A creditor can not maintain an action at law on the bond of an administrator, until his debt or demand is first reduced to judgment or decree, by a court of competent jurisdiction; and such judgment, in the absence of fraud, is conclusive against the sureties, as to the existence of the debt.—*May v. Kelly*, 489.
5. *Administrator and sureties on bond; what chargeable with.*—An execu-

EXECUTORS AND ADMINISTRATORS—*Continued.*

tor or administrator and the sureties on the official bond, are chargeable with the rental value of lands of the estate, which he failed to rent, when he could have done so.—*Ib.* 489.

6. *Administrator; additional bond of, liability of sureties on.*—Where shortly before the execution of an additional bond, an administrator reported a sale of the lands of the intestate, and that he had received the purchase-money, and therein asking authority to make a conveyance, and the sale is confirmed, it not being shown that the money was disbursed before the execution of the additional bond, the presumption is, that the money remained in the hands of the administrator at the time of the execution of the additional bond, and the sureties thereon become responsible for its proper application.—*Ib.* 489.
7. *When not barred of vendor's lien.*—Whether or not an administrator, who became a creditor of decedent in his life-time, need or can present a claim against the estate, is not decided; but the failure of a vendor of land, who afterwards becomes administrator of the vendee, to bring the debt for the purchase-money into the administration account, or to file or present the same as a claim against the estate, will not bar his right to enforce his vendor's lien in equity.—*Finn v. Barber*, 530.

See CHANCERY, 8, 13.

EXEMPTIONS.

1. *Homestead exemption; what law governs.*—The right to a homestead exemption, in favor of the widow and minor children, as against a mortgage, must be determined by the laws in force at the time of its execution, and at the death of the husband.—*Garner v. Bond*, 84.
2. *Mortgage of homestead, in which wife does not join; how far void.*—A mortgage or other conveyance of the homestead, in which the wife does not join, is void only as to the homestead; if the instrument embraces lands of greater quantity or greater value than the homestead, as defined by the constitution and statutes, the excess in value, or of quantity, passes to the grantee.—*Ib.* 84.
3. *Homestead exemption of lot in city; what essential to.*—The constitution of 1868 exempted a homestead in a city, town or village, from liability to seizure on legal process, only where the lot and appurtenances did not exceed two thousand dollars in value; and the limitations as to quantity and value not existing, there was no exemption from payment of debts, and no constitutional restraint as to alienation.—*Ib.* 84.
4. *Same.*—If the homestead exceeded the limitation of value, and was incapable of division, so as to reduce it within the limitation, there was no authority, prior to the act of 1873, to allow an equivalent in money; and that act provides for such allowance only where the homestead is sold under legal process, during the life of the owner, or his personal representative sells after his death.—*Ib.* 84.
5. *Homestead exemption; what may be the subject of.*—The other conditions concurring, lands of the statutory separate estate of the wife, may be the subject of homestead exemption.—*Weiner v. Sterling*, 98.
6. *Same; how may be aliened.*—A conveyance of such land in the manner requisite to convey the wife's statutory estate, will pass title thereto, freed from the right of homestead exemption, though the lands constitute the homestead, and there is no separate examination of the wife, apart from the husband, as required by the act of April 3d. 1873.—*Ib.* 98.
7. *Constitutional and statutory provisions with reference to alienation of the homestead; to what, apply.*—The constitutional requirement, and statutes passed to carry it into effect, as to the alienation of the home-

EXEMPTIONS—*Continued.*

stead, apply to cases where the owner thereof is a married man, and do not effect a homestead in lands of the statutory estate of the wife, which husband and wife have conveyed in the manner requisite to pass her title to such lands.—*Ib.* 98.

8. *Waiver of exemption, plea as to; what not demurrable.*—Our statute (Code, § 2849,) contemplates that in suits on written instruments in which exemptions are waived, the fact of such waiver shall be averred, and gives the defendant, not controverting the existence of the debt, the right to limit his contestation to the fact of such waiver; and the statute giving the right, such a plea is not demurrable, because it does not answer the whole declaration; the consequence of the plea if sustained, is not to deprive the plaintiff of judgment for his debt and cost, but only to prevent the insertion in the judgment of the recital of waiver which would authorize a levy on exempt property.—*Goetter, Weil & Co. v. Pickett*, 387.
9. *Waiver of exemptions; when failure to read instrument will not defeat.* One who can read and write, and had ample opportunity to read the whole of a note containing a waiver of exemptions, before he signed it, can not, in the absence of fraud or misrepresentation practiced on him, set up his own failure to read the note, in order to avoid its stipulations, or in support of a plea putting in issue the fact of the waiver of exemptions.—*Ib.* 387.
10. *Conveyance of husband's homestead; requisites of.*—Prior to the act of April 23d, 1873, the husband's conveyance of his homestead, joined in by the wife, and witnessed or acknowledged in the manner requisite to pass the wife's real estate, was sufficient; after the passage of that act, such conveyance would not pass the homestead, unless the requirements of the statute were substantially pursued.—*Cahall & Pond v. Building and Loan Ass'n*, 232.
11. *Time; defective acknowledgment and certificate to wife's assent, how may be cured.*—Where the wife's signature and assent to the conveyance of the homestead have been defectively acknowledged and certified, she may make a new acknowledgment, with the intent to cure the defect, and such acknowledgment, when properly made and certified, will relate back, rights of third persons not intervening, to the date of the original delivery of the conveyance, without any new delivery.—*Ib.* 232.
12. *Notary's certificate; how can not be impeached.*—A notary's certificate to such conveyance, in the form prescribed by statute, can not be impeached, without showing that the wife's signature was forged, or that she was subject to duress, or that fraud was practiced on her, with knowledge of the grantee.—*Ib.* 232.
13. *Homestead; wife's assent to alienation of; what sufficient.*—The constitutional requirement as to the alienation of the homestead, owned by a married man, is satisfied, if the wife gives her "voluntary signature and assent" to the husband's conveyance, though she is not named as a grantor therein, and does not in terms convey anything.—*Dooley v. Villalonga*, 129.
14. *Same.*—Though the husband alone bargains, sells, and conveys, as grantor in a mortgage, yet if the power of sale therein proceeds from both husband and wife, and vests the mortgagee with full power to sell the lands on default of payment, &c., and the wife voluntarily signs and assents to the conveyance,—this is a compliance with the constitution, and will pass title to a homestead, owned by the husband.—*Ib.* 129.

FORGERY.

See CRIMINAL LAW.

FRAUD—FRAUDULENT CONVEYANCES.

1. *Fraudulent conveyance; what admissible to sh. w.*—Where the grantor's creditors assail his conveyance for fraud, the fact that at the time of the sale, suits were pending against him, or that he apprehended suits, and other evidence of his general pecuniary condition, is admissible. *Harrell v. Mitchell*, 270.
2. *Same; indicia of fraud, burden of proof.*—Where a *bona fide* creditor shows *indicia* or badges of fraud, the burden rests on the grantee to repel the presumptions they generate; if his ability to pay is questioned, he must show the source or means by which he obtained the money, and that there was a real adequate consideration, actually paid; and whatever there may be, not in the ordinary or usual course of such transaction, should be fully explained.—*Ib.* 270.
3. *Same.*—The fact that the son, shortly after receiving a conveyance of lands from an insolvent father, conveys parts of them to each of the other children, without any valuable consideration shown therefor, casts suspicion on the transaction, which can be removed only by clear and convincing evidence of fairness, good faith, and an actual consideration, really paid.—*Ib.* 270.
4. *Conveyance; what evidence justifies decree annulling for fraud.*—The relationship of father and son between grantor and grantee; the grantor's known insolvency and apprehension of threatened suits; the failure of the grantee to show with particularity when, where or how he obtained the means to pay the consideration; the fact that shortly after the conveyance the grantee, without any valuable consideration shown, conveyed parts of the land to each of the other children; the failure to show what disposition the grantor made of the large consideration mentioned in the deed,—justify the court in holding the conveyance fraudulent as to existing creditors.—*Ib.* 270.
5. *Conveyance; what not fraudulent, and will not amount to a general assignment.*—An absolute sale and conveyance by a father, in failing circumstances, of substantially all his property to a son, without reserving any benefit to the grantor, upon the agreement that the price, which was the fair market value of the property, should be paid by the son directly to certain of the father's creditors, whose debts equalled the price for which the land was sold, and which debts the son paid,—can not be set aside as fraudulent, or declared a general assignment; though if the conveyance had not been absolute, but made to the grantee in trust for the payment of such debts, it would amount to a general assignment, under our statutes.—*Eskridge v. Abraham*, 134.
6. *Fraudulent conveyance; who can not assail.*—A conveyance to hinder, delay and defraud creditors, is voidable as to them, but valid as to the parties to it; and where by such a conveyance the husband, without intending any fraud on his future wife, divests himself of all estate and use in the lands, nothing is left out of which dower can be carved; and the future wife claiming through him at his death, can not dispute the validity of the conveyance, or have a court of equity engraft any use or trust on the lands, based on the husband's fraud, out of which to carve dower.—*King v. King*, 479.

GAMING.

See CRIMINAL LAW.

GARNISHMENT.

1. *Garnishee; how will be protected against double satisfaction.*—The garnishee being a mere stakeholder, standing in a relation of indifference between the plaintiff and defendant in the garnishment, will be protected against the jeopardy of double satisfaction, when sued by the defendant. The court states the mode in which this will be done. *Montgomery Gas Light Co. v. Merrick & Sons*, 534.

GARNISHMENT—*Continued.*

2. *Superseas; when appeal will not operate.*—Under our statutes, an appeal will not suspend execution of the judgment or decree appealed from, unless bond and security be given for that purpose, as specified by the statutes.—*Ib.* 534.
3. *Same.*—When the garnishment is dissolved, the plaintiff therein can not, by merely taking an appeal, giving security for costs only, and notifying the garnishee thereof, suspend the effect of such order, or prevent the defendant from obtaining and enforcing judgment for his demand against the garnishee.—*Ib.* 534.
4. *Same; what does not require court to stay order of execution against garnishee.*—The pendency of such an appeal from a decree dissolving the garnishment, does not require another court, in which the defendant is suing the garnishee, to stay proceedings against him, for his protection against double satisfaction; payment of the judgment will protect the garnishee from further liability, though the order or decree dissolving the garnishment be afterwards reversed.—*Ib.* 534.

GIFT.

See HUSBAND AND WIFE, 2.

GUARDIAN AND WARD.

1. *Guardianship; what not bar to bill for settlement of.*—An annual settlement passing and allowing the guardian's accounts, and ascertaining the balance due the ward, is not a bar to a bill filed by the ward after attaining majority, to compel a settlement of the guardianship. *May v. Duke*, 53.
2. *Guardian and sureties; of what can not take advantage.*—Neither the guardian, nor his sureties, can avoid a partial or final settlement of the guardianship, because the ward was not represented by guardian *ad litem*; but the ward may.—*Ib.* 53.
3. *Conversion; what amounts to.*—A loan of the ward's money upon no other security than the note of the borrower, no matter how undoubted his solvency and credit, is unauthorized; and the ward may elect to treat it as a conversion, or ratify it as proper administration; and in the latter event only does it become assets of the ward's estate.—*Ib.*
4. *Same.*—If the ward does not ratify an unauthorized loan, neither purity of intention in making it, nor diligence and good faith in endeavoring to prevent loss thereby, will absolve the guardian from liability.—*Ib.*
5. *Guardian; for what entitled to credits.*—A guardian is entitled to credit only for moneys actually expended, or necessities furnished the ward; the *onus* being on the guardian to support his claim for credits, by evidence of a character which would support his action, if he were suing the ward in an action *ex contractu*.—*Ib.* 53.

HOMESTEAD.

See EXEMPTIONS.

HOMICIDE.

See CRIMINAL LAW, 18.

HUSBAND AND WIFE.

1. *Equitable estate; what creates.*—A legacy to a married woman under the provisions of her father's will, directing that the amount "shall go into the hands of a trustee for her use and behoof, and no other," manifests a clear intention to vest in her an equitable estate; and where the trustee purchases lands, it is his duty to take a conveyance on the same trusts; and he having done so, a marriage settlement entered into by the wife, after the husband's death, upon the eve of a second marriage, can not alter her estate as to such lands, whatever

HUSBAND AND WIFE—*Continued.*

- effect it might have on after acquired property; and the wife may bind such estate by her contracts, notwithstanding her coverture and the terms of the marriage settlement.—*Sprague v. Shields*, 428.
2. *Equitable separate estate; what creates.*—A gift by the husband to the wife, of property, real or personal, creates in the wife an equitable separate estate, and property thus acquired is not within the operation of statutory or constitutional provisions which create the separate estate.—*Helmetag v. Frank*, 67.
 3. *Same; incidents of.*—An incident of an equitable separate estate is the power of the wife to alienate or charge it, as if she were a *femme sole*, unless restrained by the instrument creating it. She may mortgage it as security for her own debt, or that of the husband.—*Ib.* 67.
 4. *Statutory estate of married woman; power to convey.*—The wife's capacity to convey her statutory estate is no greater in equity, than at law; and by the uniform decisions of this court she can not mortgage it, whether alone or jointly with her husband; and if she attempts to do so, no title passes thereby.—*Lehman, Durr & Co. v. Garrett*, 391.
 5. *Mortgage of statutory estate of wife, how far void; when husband by joining in, will convey his life-estate on wife's death intestate.*—Where the wife, with the husband's concurrence, purchases and partly pays for land, and they procure a third person to advance the amount of the deferred payment, which is paid by the wife to the vendor, who conveys to her in terms creating a statutory estate, husband and wife promising at the time to execute a mortgage on such lands to secure the lender, and they afterwards execute a note and mortgage pursuant to the agreement, the instrument containing the statutory words "grant, bargain and sell," and also covenants to "warrant and defend the title" against the "lawful claims of all persons,"—such mortgage is void as to the wife, and can not prejudice her or her heirs; but its covenants estop the husband from denying its validity; and upon the wife's death intestate, the husband surviving, the mortgage will have the effect to pass his life-estate.—*Chapman v. Abraham*, 108.
 6. *Liability of wife's statutory estate for necessities; effect of admissions by husband.*—Acts or admissions of the husband will not prevent or remove the bar of the statute of limitations, as to the remedy against the statutory estate of the wife, for articles of comfort and support of the household.—*Lee v. Campbell*, 12.
 7. *Same; what are necessities, in the meaning of the statute.*—Under the statute in force in the year 1863, the statutory estate of the wife was not liable except for food, raiment, habitation, medical assistance, and medicine,—necessaries for which the husband would be responsible at common law, though supplied without his knowledge or consent.—*Ib.* 12.
 8. *Same.*—A smoke-house, carriage-house, and fencing, are not necessities within the meaning of the statute.—*Ib.* 12.
 9. *Legal title to personalty taken by husband in payment of debts due the wife; in whom vests.*—The husband has authority to accept property in payment of debts due the statutory estate of the wife; and if he does so, intending the transaction for the wife's benefit, without taking title to himself, though without expressly taking title to the wife, the legal title to the property, if it be personal, of necessity vests in the wife, and the husband's mortgage can not divest it.—*Evans v. English*, 416.
 10. *Legal title to property acquired by husband's exchange of wife's property, where statutory mode of conveyance is not followed; in whom vests.*—Our statutes prescribe the only mode in which the statutory estate of the wife may be conveyed; and if the husband exchanges a portion of the wife's statutory estate for other property, the wife's property not having been conveyed in the statutory mode, the legal

HUSBAND AND WIFE—*Continued.*

title to the property acquired by the exchange vests in the husband, and his mortgagee, under circumstances constituting a *bona fide* purchaser for value, without notice, is entitled to protection against the wife's equities to the exchanged property.—*Ib.* 416.

11. *Husband and wife; what not contract between, within prohibition of statute.*—A receipt given by the husband to his wife, acknowledging that he had received from her a certain amount of money, for investment, with a like amount of his own, in certain exchange which he purchased, and that the wife was entitled to one-half of the proceeds when sold,—is not a contract between husband and wife, within the meaning of the statute forbidding their contracting with each other. *Haynie v. Miller*, 62.
12. *Same; burden of proof.*—The husband's receipt is an admission that the money rightfully belonged to the wife, and *prima facie* entitles her to a recovery; if her right to the money is denied, it must be disproved by those who controvert it.—*Ib.* 62.

See EXEMPTIONS, 1, 2, 10, 11, 12, 13, 14.
DOWER.

INDICTMENT.

See CRIMINAL LAW.

INSURANCE.

1. *Contract of insurance; requisites of.*—In the absence of statutory prohibition, a contract of insurance may be made by parol, or there may be a parol agreement to insure, which a court of equity will enforce; but whether made by parol or writing, as in all other contracts, the mutual assent of the parties to all the elements and terms of the contract, is essential to its existence.—*Ala. Gold Life Insurance Co. v. Mayes*, 163.
2. *Same; what does not constitute.*—B obtained from the agent of an insurance company,—who claimed to exercise no other power than to receive B's application of life insurance, the percentage of the premium and the fees for the policy, and note for the remainder of the premium, and forward the same for the rejection or acceptance of the insurance company—a written instrument or receipt, reciting that B had made application for a policy of insurance on his life, for a given sum; the payment of a certain part of the first annual premium, &c., and B's note for the remainder. This instrument further states, that "B was to be considered insured from the date of the receipt, *if said application shall be approved and accepted by said company*, in which case a policy shall be issued to him, and this receipt surrendered; but if said application shall be rejected, then the amount named and the note given, shall be returned to B, and this receipt shall become null and void." This application was duly forwarded to the Insurance Company, which after a delay of several weeks, rejected the application, but did not give up the cash payment or note, no demand having been made for their return. B was taken sick about this time, and died a few weeks afterwards without being informed of the rejection of his application, and his administrator brought suit upon the receipt, as on a contract of insurance,—*held*:

1. The transaction constituted merely a proposal from B to the agent for a contract, the unqualified right of acceptance or rejection being reserved to the principal, and the proposal could not ripen into a contract, until accepted by the principal.

2. Mere delay of the Insurance Company in accepting the offer or proposal, and in returning the cash premium, for which demand was not made, did not amount to an acceptance of the proposal, and convert it into a contract.

INSURANCE—Continued.

3. The Insurance Company had the right to decline acceptance of the proposal without assigning any cause, no contract being made by the agent, who claimed no power to make any contract; and herein this case differs from those where an agent having authority to make contracts of insurance, makes one subject to approval of his principal,—as to which it is held the principal can not withhold his approval, without sufficient cause.
4. The transaction until the proposal of B for life insurance was rejected was merely preparatory to or initiatory of a contract, and was terminated absolutely by the rejection of the proposal; no other duty remaining afterwards on the Insurance Company than to return, on demand, the cash paid by B, and the note given by him.—*Id.* 163.
3. *Same; policy of, construed.*—A policy taken out by piano and music dealers, against loss by fire, describing the property as "*their own or held in trust,*" will, in the absence of evidence to the contrary, cover a piano left with them for sale or rent; but oral evidence is admissible to show what goods were intended to be, and were insured under the general words of the policy.—*Snow v. Carr*, 363.
4. *Same; what evidence admissible to show contents of.*—In action against the insured for money had and received, by one who claimed that his goods were covered by the policies of insurance, the amount of which the insured had collected, secondary evidence may be given of the contents and terms of the policies, where they have been cancelled, and returned to the insurer in a foreign country.—*Id.* 363.
5. *Insurance money, right to share in; what does not forfeit.*—One who effected insurance covering his own and other goods stored with him, and collected the amount of the policy on the happening of the loss, can not defeat an action by the owner of such goods for his share of the insurance money, because such owner never requested any insurance and did not know that it was taken out until after the loss, and failed to ratify expressly, or otherwise, the acts of the warehouseman in taking out the policy, before the payment of the loss.—*Id.* 363.
6. *Same.*—In such case the insured holds the amount collected as trustee for the owner of such goods as well as those held in his own right, and the failure to make proof of loss of the goods of other persons, the value of his own goods being more than the amount of the policy, which he collected in full, will not prejudice the rights of such persons; nor can he claim to have the loss of his own goods first made good out of the fund received, before owners of the other goods can share therein.—*Id.* 363.

INSPECTION OF RECORDS

See AUDITOR, 1, 2.

INTEREST.

See USURY.

JEOPARDY.

See CRIMINAL LAW.

JUDGMENT AND DECREE.

1. *Judgment; when not evidence.*—A judgment against the executor on a cause of action against the testator, is no evidence of the existence of indebtedness as against the heir or devisee, on bill to subject lands devised or descended; but the rule is otherwise, where the devisee is executor, and the judgment is against him in his representative capacity; for on return of no goods of testator, execution could issue *de bonis propriis*.—*Boykin, Ex'r, v. Cook, Adm'r*, 473.
2. *Judgment; what grossly irregular.*—Judgment to be levied *de bonis*

JUDGMENT AND DECREE—*Continued.*

- propriis*, in a suit against the executor as such, on a cause of action against the testator, is grossly irregular, and is properly amended *nunc pro tunc* at a subsequent term so as to make it *de bonis testatoris*; and the amendment when made will relate back to the date of the original judgment.—*Ib.* 472.
3. *Same; when void.*—A sale of the testator's lands, devised or descended, levied on and sold as his property, under execution so framed as to operate only on the executor personally, and issued on a judgment against him in his representative capacity, and a deed conveying such title as the defendant had *as executor* in the lands, are utterly inoperative and void.—*Ib.* 472.
 4. *Judicial sale; when not affected by reversal of decree under which it is made.*—The title of a stranger purchasing lands at judicial sale under an erroneous judgment or decree, will not be defeated or impaired by a subsequent reversal of the decree.—*Marks v. Cowles*, 299.
 5. *Same; when reversal defeats.*—Where a party to the decree purchases under an erroneous judgment or decree in his own favor, he acquires a defeasible title only, which fails upon a subsequent reversal of such judgment or decree.—*Ib.* 299.
 6. *Same.*—The assignee of one who purchased under an erroneous decree in his own favor, stands in the shoes of his vendor, and a subsequent reversal defeats his title also; and the judgment or decree being the foundation of the title, the assignee or vendee of such purchaser is bound to take notice of it, and therefore not entitled to protection as a *bona fide* purchaser, for value without notice.—*Ib.* 299.
 7. *Purchaser at judicial sale; when not bound by.*—In general a purchaser at judicial sale is bound, though he takes nothing thereby; but the rule is subject to the exception that no one will be bound, if the sale is absolutely void.—*Boykin v. Cook*, 472.
 8. *Same.*—The plaintiff in a judgment against the executors, in their representative capacity, who causes execution issued thereon and operating only against them personally, to be levied on lands of the testator, devised or descended, and sold as such, bidding the full amount of his judgment, and receiving a conveyance of all the interest the executors had as such in the lands—does not thereby satisfy the debt, the sale and conveyance being void, and he not actually realizing anything at the sale.—*Ib.* 472.
 9. *Submission for decision in vacation; construed.*—A bill of exceptions was reserved to the ruling of the probate judge on a contest of the election for county solicitor, and an appeal taken from this judgment to the Circuit Court, where the cause was submitted, by consent, to the circuit judge for decision in vacation, with the stipulation that the decision "*be made in eight weeks and entered up as of the present term*,"—*held*: The terms of the submission were satisfied, if the judge reduced his decision and judgment to writing, within the prescribed period, so that it could be entered of record at a future day; and the judgment was valid, though not filed with the clerk and entered of record until the succeeding term, and after the expiration of the judge's official term.—*Hamil v. Gibson*, 261.
 10. *Correction of judgment, nunc pro tunc.*—Our statute of amendments does not apply to criminal cases; but the inherent common law power of the courts to correct clerical misprisions, where its records furnish proper basis therefor, extends to criminal as well as civil cases. It is the duty of the clerk to tax costs and make a memorandum thereof, and such memorandum, when made during the term, become a *quasi* record, which authorizes the correction *nunc pro tunc*, at a succeeding term, of a judgment rendered at a former term, which left blank the number of days hard labor to which the defendant was sentenced. *Ex parte Jones*, 399.

JUDGMENT AND DECREE—*Continued.*

11. *Execution on decree in chancery; when erroneous.*—A decree in a foreclosure suit, on bill to enforce a vendor's lien, ascertaining the amount of indebtedness, has the force and effect of a judgment; but execution can not issue until after sale and confirmation and decree ascertaining the balance due.—*Winston v. Browning*, 80.
12. *City Court of Selma, judgment of; when will not be reversed for erroneous ruling on demurrer.*—A judgment rendered by the City Court of Selma, the presiding judge determining both law and fact, as required when a jury is waived, will not be reversed, merely because of erroneous rulings on demurrer to defective counts of the complaint filed on appeal from a Justice's Court, if there is one good count, and the judgment is right on all the evidence, which is fully set out in the record.—*Meyer v. W. U. Tel. Co.* 159.
13. *Affirmed judgment; can not be corrected or altered by lower court.*—A judgment of the lower court affirmed on appeal, is merged in the judgment of this court, and can not be altered by the lower court; nor by this court, after the expiration of the term at which it was rendered.—*McArthur v. Dune*, 539.
14. *Damages against sheriff for failure to pay over money; what motion sufficient to support judgment for.*—The statute prescribes the damages recoverable of a sheriff in a summary proceeding for failure to pay over money collected on execution; and if the motion sets forth the facts with sufficient certainty, it is in effect a motion for damages also, and will support a judgment awarding them.—*Ib.* 539.
15. *Redemption; confessed judgment, not available to defeat.*—Our statutes prohibit the use of a confessed judgment to a purchaser, who is resisting redemption of the debtor's property sold under judicial process, as well as to a creditor who is seeking to redeem it.—*M. M. Ins. Co. v. Steele*, 253.

JUDGE.

See CONSTITUTIONAL LAW, 8, 9.

JUROR AND JURY.

See CRIMINAL LAW.

JUSTICE OF THE PEACE.

1. *Writ of seizure; when justice may issue.*—A justice of the peace, after exacting proper affidavit and bond in a *detinue* suit, has jurisdiction, dependent upon the value of the property, to issue a writ of seizure.—*Jacobs v. State*, 448.
2. *Appeals from justice's court; how tried.*—Appeals from justice's judgments are to be tried on appeal according to equity and justice, and the declaration filed on appeal, is not subject to technical rules of pleading, and is sufficient if it shows in general terms a debt due, or a contract to be performed, and a breach thereof.—*W. U. Tel. Co. v. Meyer*, 159.

LANDLORD AND TENANT.

1. *Landlord and tenant; what creates relation of.*—An agreement between two tenants in common, whereby one occupies and cultivates the joint estate, contracting to pay the other a stipulated rent for his portion, creates the relation of landlord and tenant between them, with its usual rights and incidents.—*Evans v. English*, 416.
2. *Landlord's lien for advances; when necessary under act of March 8th, 1871.*—The statute of March 8th, 1871, (prior to its amendment, § 2467 of Code) giving the landlord a lien for advances, &c., required that the advances should be made by the landlord himself, and for the purpose of aiding in the cultivation of the rented lands for the cur-

LANDLORD AND TENANT—*Continued.*

rent year; if the advances were not thus made, and for the specified purpose, the statutory lien did not attach as to such particular items—*c. q.*—as where the landlord forbore to collect his rent for a previous year, and re-rented for another year, under an agreement that the amount of back rent should be an advance for the current year.—*Id.*

3. *Advances by landlord; what one claiming under, must prove as to.*—In trover by the mortgagee of tenants, against a defendant claiming crops by delivery from the landlord, whose title depended upon having made advances to the tenants, the defendant must make the same measure of proof as to the amount and value of the advances, as would be required of the landlord, if he were suing the tenants; mere proof that the landlord had made advances, without showing the amount or value, will not defeat the mortgagee's action.—*Steiner & Bro. v. McColl*, 413.

See ADVANCES.

LEGACY.

See WILLS.

LEGISLATURE.

See CONSTITUTIONAL LAW, 1, 7.

LIEN.

See ADVANCES, 1, 5.

LANDLORD AND TENANT, 6.

VENDOR AND PURCHASER.

LIMITATIONS—STATUTE OF.

1. *Vendor's lien; what not bar to enforcement of.*—In the absence of any agreement to the contrary, the vendor retains a lien on lands for the unpaid purchase-money, though he has made an absolute conveyance in fee to the vendee, and put him in possession; and the fact that the debt, as a mere legal demand, is barred by the statute of limitations, is no bar to the enforcement of the lien in equity.—*Flinn v. Barber*, 530.

See EJECTMENT.

PLEADING AND PRACTICE, 3, 4.

LOTTERY.

1. *"Tuskaloosa Scientific and Art Association," charter of; does not authorize lottery.*—The charter of the "Tuskaloosa Scientific and Art Association," &c., approved February 3d, 1866, construed, and the conclusion declared that it does not authorize a lottery on the numerical or combination plan; or on any other plan where money or its equivalent is offered or distributed as premiums.—*Boyd v. State*, 177.

MANDAMUS.

1. *Mandamus; when will not lie to compel Auditor to correct a restatement of account.*—The Auditor in settling a public official's account for one year, has no authority to re-state an account settled and certified by his predecessor in a former year, embracing in the last account items which should have been included in the former, and then by certifying such re-stated account, make it presumptive or *prima facie* evidence of its correctness; but where it is not averred that the Auditor has certified, or will attempt to certify, as correct, items brought forward from the settlement had in a former fiscal year with his predecessor, or that suit has been brought or threatened to be brought, such alteration of the account works no harm to the officer; and having an ample remedy in defense of suit, if brought, he is not

MANDAMUS—*Continued.*

- entitled to *mandamus* to compel the Auditor to strike out such disputed items.—*State ex rel. v. Brewer*, 318.
2. *Same*; when lies to compel inspection of public record.—Where the party has no interest, or the disclosure sought would be detrimental to the public interests, inspection of the records of an executive department of the government may be denied. Public interests are not endangered, by allowing a tax-collector, or his attorney, to inspect the collector's account with the State, as kept in the Auditor's office; and if such inspection is requested, and the Auditor denies it, *mandamus* lies against him.—*Brewer v. Watson*, 310.
 3. *Mandamus*; when does not lie.—*Mandamus* is not the proper remedy, to compel a court or magistrate to discharge a person, alleged to be improperly detained under process issued by such court or magistrate.—*Ex parte Graves*, 381.

MASTER AND SERVANT.

1. *Corporation*; what duty owes employes, in selection of fellow servants. A railroad corporation owes a duty to its employes, to exercise due care and diligence in the selection and appointment of their fellow-servants, and is answerable for injuries resulting from its want of care or skill, in these respects; though if these have been observed, it is not responsible to one servant, for injuries resulting from the negligence of his fellow-servant.—*Tyson v. S. & N. A. R. R. Co.* 554.
2. *Same*; delegation of power of appointment, effect of.—Whoever exercises the power of appointing and removing employes or servants, though his grade of employment as to other matters, makes him their fellow-servant, exercises a corporate function; and though he be ever so competent himself, and due care has been exercised in selecting him for that purpose, his negligence or mistakes in selecting employes, are the negligence or mistakes of the corporation, for which it must answer.—*Ib.* 554.

MORTGAGE.

1. *Mortgage*; what sufficient consideration for.—One's own debt, though past due, is always a sufficient consideration to support his mortgage to the creditor to secure the debt; and as to parties and privies is as effectual, as if made upon an adequate new consideration.—*Turner v. McFee*, 468.
2. *Mortgage*; registration of; what will not avoid effect of.—A mortgage duly filed for record and recorded, will not lose the privileges conferred by the registration statutes, because of the failure of the probate judge to properly note it in the index, which the law requires him to keep.—*Ib.* 468.
3. *Mortgage* to secure antecedent or subsequent debt; validity of.—As between mortgagor and mortgagee and their privies, a mortgage to secure an antecedent debt, or a debt subsequently to be contracted, is perfectly valid, whatever may be its effect as to subsequent purchasers or incumbrancers.—*Steiner v. McCall*, 406.
4. *Invalidity of mortgage of lands*; purchaser at execution sale, when estopped from asserting.—One buying lands which the vendor had encumbered by mortgage, to secure a debt to a third person, and expressly agreeing with the seller and the mortgagee to pay such debt, which is deducted from the cash payment required, subordinates his title to the mortgage, and is estopped from denying its validity; and the mortgage being duly recorded, a purchaser of the lands at a sale on execution against the vendee, merely succeeds to his rights, and is also bound by the estoppel.—*Kennedy v. Brown*, 296.
5. *Attorney's fees*; when may be included in mortgage.—A stipulation in the mortgage, that the mortgagor, in addition to legal interest, shall pay to the mortgagee attorney's fees incurred in collecting the debt,

MORTGAGE—*Continued.*

- will not render the agreement usurious; but a reasonable amount only can be collected, though a larger sum or per cent. is agreed on. *Munter & Fisher v. Linn*, 492.
6. *Mortgage of homestead, in which wife does not join; how far void.*—A mortgage or other conveyance of the homestead, in which the wife does not join, is void only as to the homestead; if the instrument embraces lands of greater quantity or greater value than the homestead, as defined by the constitution and statutes, the excess in value, or of quantity, passes to the grantee.—*Garner v. Bond*, 84.
 7. *Mortgage of statutory estate of wife, how far void; when husband by joining in, will convey his life-estate on wife's death intestate.*—Where the wife, with the husband's concurrence, purchases and partly pays for land, and they procure a third person to advance the amount of the deferred payment, which is paid by the wife to the vendor, who conveys to her in terms creating a statutory estate, husband and wife promising at the time to execute a mortgage on such lands to secure the lender, and they afterwards execute a note and mortgage pursuant to the agreement, the instrument containing the statutory words "grant, bargain and sell," and also covenants to "warrant and defend the title" against the "lawful claims of all persons,"—such mortgage is void as to the wife, and can not prejudice her or her heirs; but its covenants estop the husband from denying its validity; and upon the wife's death intestate, the husband surviving, the mortgage will have the effect to pass his life-estate.—*Chapman v. Abraham*, 108.
 8. *Equitable estate; incidents of.*—An incident of an equitable separate estate is the power of the wife to alien or charge it, as if she were a *femme sole*, unless restrained by the instrument creating it. She may mortgage it as security for her own debt, or that of the husband. *Helmetag v. Frank*, 67.
 9. *Statutory estate of married woman; power to convey.*—The wife's capacity to convey her statutory estate is no greater in equity, than at law; and by the uniform decisions of this court she can not mortgage it, whether alone or jointly with her husband; and if she attempts to do so, no title passes thereby.—*Lehman, Durr & Co. v. Garrett*, 391.
 10. *Mortgage of homestead.*—Though the husband alone bargains, sells, and conveys, as grantor in a mortgage, yet if the power of sale therein proceeds from both husband and wife, and vests the mortgagee with full power to sell the lands in default of payment, &c. "and the wife voluntarily signs and assents" to the conveyance,—this is a compliance with the constitution, and will pass title to a homestead, owned by the husband.—*Dooley v. Villalonga*, 129.
 11. *Mortgage, defective execution of; what cures.*—Though a mortgage as originally executed is invalid, yet if the mortgagor subsequently executes a power of sale of the lands conveyed by the mortgage, accurately identifying it and the debt secured, and authorizing a sale for the purpose of paying such debt,—this cures the invalidity of the mortgage.—*Alexander v. Caldwell*, 543.
 12. *Bill to enjoin sale under mortgage; when demurrable.*—A mortgagor seeking to enjoin a sale, under a power in the mortgage, on the ground of usury, must either bring the money and lawful interest into court, or must by his offer submit himself to the jurisdiction of the court, that it may do complete equity between the parties; otherwise his bill is demurrable.—*Eslava v. Crampton*, 507.
 13. *Same.*—Where the bill contains such offer, a decree of foreclosure may be made without any cross-bill; and a cross-bill being unnecessary, it is immaterial whether a cross-bill was formal, or had been properly put at issue.—*Id.* 507.

NEGLIGENCE.

1. *Contributory negligence; doctrine of discussed.*—The doctrine that one who has contributed proximately to the injury can not recover damages therefor, is now too firmly rooted in our jurisprudence to be open to further controversy; it rests not on the idea that one wrong sets off the other, or that one justifies the other, but on the broader ground, that when the negligence of the plaintiff has contributed proximately to the injury, the damage is considered of his own causing, and it is difficult, if not impossible, to determine the *quantum* of injury which resulted from that defendant's tortious or negligent conduct.—*M. & C. R. R. Co. v. Copeland*, 376.
2. *Negligence; what fires charge of, on railroad company.*—The failure to ring the bell or blow the whistle on the starting of the train, as required by the statute, fixes the charge of negligence on a railroad company; and any one injured thereby may recover damages for the injury, unless his own negligence or fault has disabled him from making complaint.—*Ib.* 376.
3. *Contributory negligence; what will defeat recovery.*—Plaintiff's intestate got off a passenger train of defendant, which had just arrived in a small incorporated town, and attempted to crawl between two cars of a freight train standing on a side track, with locomotive attached and steam up, ready to start, which stood between him and the depot. Those in charge of the freight train did not see him, and backed it without giving proper signals, just as he got between the cars,—*held*: The conduct of the deceased can not be classed less than negligence, bordering on recklessness, and contributed proximately to his death, and his personal representative can not recover, though defendant was negligent in not giving proper signals before its train started—the injury not having been inflicted wantonly or intentionally.—*Ib.* 376.

See MASTER AND SERVANT, 1, 2.

NEW TRIAL.

1. *New trial.*—The Supreme Court has no power to grant a new trial. *Rash v. State*, 89.

NOTARY.

See DEEDS, 12.

NON-CLAIM, STATUTE OF.

1. *Claims against insolvent estate; statutes concerning filing of, construed.* The purpose and object of the statute requiring the filing of claims against an insolvent estate, are complied with, when a statement of a claim is filed, which, when taken in connection with the affidavit accompanying it, fairly discloses an existing liability preferred against the estate.—*Thornton v. Moore*, 347.
2. *Defenses, what can not be made, if not presented within twelve months.* Where no objection to the merits of a claim, duly filed against an insolvent estate, is made within twelve months after the declaration of insolvency, all defenses existing or occurring within that period, are barred; but matters subsequently occurring, which are a valid bar to the demand, or which deprive the creditor, in equity and good conscience, of all right to share in the fund, may be made available at any time before rendition of final decree, declaring the amount of the claim and the rateable proportion of assets to which the claimant is entitled.—*Ib.* 347.
3. *Same; mode of objection.*—The proper mode of objecting to a plea, filed more than twelve months after the declaration of insolvency, seeking to make available against a claim matters of defense arising within that time, is a motion to strike from the files.—*Ib.* 347.
4. *Defective verification; when amendable.*—An insufficient verification to

NON-CLAIM. STATUTE OF—*Continued.*

- a claim, filed within the proper time, against an insolvent estate, is amendable at any time before final decree.—*Ib.* 347.
5. *Objection to claim against estate; when must be filed.*—The allowance of a claim duly filed against an insolvent estate, is matter of right, unless objections to its merits be filed within twelve months after the declaration of insolvency; and all matters of defense existing within that period and not duly filed, are forever barred.—*Herbert v. Thames*, 340.
 6. *Same.*—Matters subsequently occurring, which are a valid bar to the demand, or which debar the creditor of all right, in equity and good conscience, to share in the distribution, may be shown at any time before final decree declaring the amount of the claim, and the rateable proportion of assets to which the claimant is entitled.—*Ib.* 340.
 7. *When need not be presented.*—Whether or not an administrator, who became a creditor of decedent in his life-time, need or can present a claim against the estate, is not decided; but the failure of a vendor of land, who afterwards becomes administrator of the vendee, to bring the debt for the purchase-money into the administration account, or to file or present the same as a claim against the estate, will not bar his right to enforce his vendor's lien in equity.—*Flinn v. Barber*, 531.

OVERRULED CASES, AND HEREIN OF CASES CRITICISED AND RE-AFFIRMED.

1. *OVERRULED CASE.*—*Miller v. Parker*, 47 Ala. 312, overruled as rights of transferee of claim filed against insolvent estate.—*Thornton v. Moore*, 348.
2. *Same.*—*Williams v. Sims*, 22 Ala. 512, overruled as to what sufficient consideration to support promise.—*Underwood v. Lovelace*, 155.
3. *CASE EXPLAINED.*—When this case was here at a former term (see *Dane v. McArthur*, 57 Ala. 448), on appeal from a judgment against Dane and his sureties, this court was compelled to correct a clerical error, and to amend the judgment so as to operate against Dane alone; and having to correct this error before the judgment could be affirmed, could not, and did not, award damages on affirmance; the judgment of the Circuit Court against Dane was not disturbed, nor was it decided that its judgment for damages was erroneous.—*McArthur v. Dane*, 539.
4. *CASE DISTINGUISHED.*—The case of *Jensen v. Nabring*, 50 Ala. 392, distinguished from this.—*Alexander v. Caldwell*, 543.
5. *CASE ADHERED TO.*—The court adheres to its decision in *State, ex rel. Harrell, v. Mobile and Montgomery Railway Company*, 59 Ala. 325, that the second section of the act of April 19th, 1873, which provides that railroad companies "may for the transportation of local freight, demand and receive not exceeding fifty per cent. more than the rate charged for the transportation of the same description of freight, over the whole line of its road,"—does not authorize the addition of fifty per cent. on the charge over the whole road, irrespective of the distance the freight may be carried, but only an additional fifty per cent. more per mile, for the distance local freight is carried, than the per mile rate charged on goods carried over the whole line.—*M. & M. Ry Co. v. Steiner, Metcalfe & Co.* 559.
6. *CASES CITED AND RE-AFFIRMED.*—The court reaffirms the principles decided in *Savannah and Memphis Railroad Co. v. Shearer*, 58 Ala. 672; *Tanner v. Louisville and Nashville Railroad Co.* 60 Ala. 621; *Mobile and Montgomery Railroad Co. v. Blakely*, 59 Ala. 471.—*M. & C. R. R. Co. v. Copeland*, 376.

PARTNERSHIP.

1. *Commercial partnership; what constitutes.*—A partnership in the business of buying cattle and slaughtering them for sale, and dealing in

PARTNERSHIP—*Continued.*

vegetables and like commodities, is a commercial partnership; each member of which has the right to draw, accept, or endorse bills of exchange in the firm name, and bind the partnership, as to third persons, dealing fairly and in good faith, as to matters usually incident to the business; and it is immaterial in such a case, as to a person thus dealing with one of the partners, that the other was not informed of the transaction, and repudiated it as soon as it came to his knowledge.—*Wagner v. Simmons & Co.* 143.

2. *Bill to establish partnership; when not maintainable.*—A bill will not be entertained to establish a partnership between two persons, settle its dealings, and declare one of them trustee for the benefit of the other as to purchases of real estate, when more than twenty years have elapsed since the accrual of the right, before suit brought, during all of which period the defendant denied and disregarded the rights of the other alleged partner; and the fact that the partners were brothers, complainant being averse to litigation, and on that account failing to sue in time, will not alter the case.—*Phillippi v. Philippi*, 41.

PARTIES.

See CHANCERY, and PLEADING AND PRACTICE.

PAYMENT.

1. *Receipt; when will not amount to satisfaction.*—A receipt in full, on payment of a less sum than was actually due by the sheriff, on a judgment against him and his sureties, for his failure to pay over money collected on execution, will not prevent the issue of execution afterwards to collect the statutory damages, where the plaintiff in the judgment was ignorant of his right to any damages, at the time the receipt was given; in that event, the receipt will only operate as satisfaction *pro tanto*.—*McArthur v. Dane*, 539.
2. *Payment of money order to impostor; when telegraph company is not liable for.*—An impostor at Cincinnati, sent a dispatch in the name of B., over defendant's line, to C. at Selma, Alabama, requesting C. to send a telegraphic money order to B. at Cincinnati. C. thereupon purchased of defendant, at Selma, a telegraphic money order payable to B. at Cincinnati, and defendant paid the money there to the impostor, who was the sender of the message,—*held*:
 1. Where there is nothing to create suspicion in the minds of the agents of the telegraph company, it is the duty of the party of whom the request is made to remit the money, to ascertain for himself whether he who makes the request, is the person he professes to be.
 2. In the absence of anything generating suspicion, the telegraph company has no right to refuse payment of the money to him in reply to whose message it was sent; and is not liable for a payment made *bona fide* to such person, though it turns out that he was an impostor. *W. U. Tel. Co. v. Meyer*, 158.
3. *Payment; what does not amount to.*—The renewal of the evidence of a debt secured by mortgage, is not a payment; nor does it impair the lien of the mortgage.—*Helmetag v. Frank*, 67.

See TENDER.

VENDOR AND PURCHASER.

PENALTIES.

1. *Imposition of penalty; when not invasion of chartered rights.*—Where a law, when a corporation is formed, or which it afterwards accepted, exacts certain duties of it, a subsequent statute imposing a penalty, where none existed before, for a failure to perform such duties, does not impair any corporate right or otherwise violate the constitution. *M. & M. Ry Co. v. Steiner, McGehee & Co.* 559.

PERJURY.

See CRIMINAL LAW.

PLEADING AND PRACTICE.

I. COMPLAINT.

1. *What complaint discloses substantial cause of action.*—A receipt given by the husband to his wife, acknowledging that he had received from her a certain amount of money, for investment, with a like amount of his own, in certain exchange which he purchased, and that the wife was entitled to one-half of the proceeds when sold,—is not a contract between husband and wife, within the meaning of the statute forbidding their contracting with each other; and a complaint by the wife's administrator against the husband's personal representative, claiming a sum certain as due according to such receipt, which is set forth, discloses a substantial cause of action.—*Haynie v. Miller*, 62.
2. *Case; what counts are in.*—A count seeking recovery for personal injuries, occasioned by falling in a ditch dug by defendant in the public highway, and averring that the injury was suffered and caused by the gross negligence of defendant in cutting the ditch and leaving it exposed, without proper safeguards, &c., is in case; and so also, is a like count, which alleged a duty of defendant to furnish bridges, barricades, or other usual means, to protect the public from injury, which defendant failed to provide, and that plaintiff suffered the injury by reason of the gross negligence of defendant, in cutting the ditch and leaving it exposed, without using proper precautions to guard the public, &c.—*S. & N. A. R. R. Co. v. Chappell*, 527.

II. PLEAS.

3. *Plea; what bad.*—A plea professing to answer the whole declaration or complaint, is bad on demurrer, if it answers part only.—*Galbreath v. Cole*, 139.
4. *Same.*—A count for "*goods sold and delivered*" covers a sale, at a stipulated price for cash, or on a credit which had expired before suit was brought; and as the statute of limitations of three years, applies only to open accounts, where some term of the contract is not settled by the parties, the plea, when interposed to a demand for "*goods sold and delivered*," is bad on demurrer, unless it states that the demand was an open account.—*Ib.* 139.
5. *Plea of misnomer; effect of failure to present.*—Misnomer of a party, if not pleaded, is waived, and when it is necessary to plead the judgment, the real party may connect himself with it, by averment of his proper name,—a garnishee can not abate the proceedings against him for want of correspondence between the name of the plaintiff in the garnishment and in the judgment.—*Lehman, Durr & Co. v. Warner*, 455.
6. *Plea of tender; what insufficient.*—Where the purchaser of lands conveyed under the mortgage sale, brings ejectment against the mortgagor, the latter's plea that, before suit was brought, and within the time prescribed by statute, he tendered the amount required to redeem,—the plea not being accompanied by deposit with the clerk of the amount tendered—presents no defense to the action, and should be rejected, on motion.—*Alexander v. Caldwell*, 543.
7. *Plea; what dispenses with proof of paper title.*—A mortgagor in possession, pleading in bar of ejectment, by one claiming under a purchaser at the mortgage sale, that after the sale he became tenant of the purchaser, and made him the proper statutory offer and tender for redemption, thereby admits of record that such purchaser then had title, and takes upon himself the onus of showing that he redeemed under the statute.—*Ib.* 543.

PLEADING AND PRACTICE.—*Continued.*

III. REVIVOR.

8. *Revivor*; within what time must be made.—Under our statutes, *revivor* in favor of or against the legal representative can not be made, if moved for after eighteen months from the occurrence of the event which renders it necessary; and the same rule applies where *revivor* is sought in the name of a succeeding administrator, or other successor in the right to sue or be sued, in place of one removed, as where *revivor* is made necessary by the death of a party.—*Brown v. Tutwiler*, 372.
9. *Same*.—The fact that the suit was brought by an administratrix, on a contract made with her as such, and that *revivor* was sought in the name of the succeeding administrator upon her removal, within eighteen months after it was made known to the court, though a longer period had elapsed since the removal was made, does not alter the rule. *Ib.* 372.

IV. GENERAL PRACTICE.

10. *Rebutting examination*; discretion of lower court as to.—The general rule, that a rebutting examination must be confined to the matters of the cross-examination, is not inflexible, but may be varied in the discretion of the presiding judge, according to the circumstances of the particular case, and the appellate court will not interfere with the exercise of such discretion, unless it be very clear that the party complaining has been injured.—*Wagner v. Simmons & Co.*, 144.
11. *Same*.—The mere repetition in rebuttal, of facts stated by the witness on his original examination, does not injure the party against whom his deposition was taken, and is not ground for reversal.—*Ib.* 144.
12. *Re-examination of witness*; when not error to refuse.—The re-examination of a witness, at the instance of a party who has already introduced and examined him, that he may repeat his testimony, rests within the discretion of the primary court, and the exercise of that discretion is not revisable.—*Newbrick & Bros. v. Dugan*, 251.
13. *Introduction of evidence*; what ruling as to, not revisable.—It rests within the sound discretion of the court, to allow a party to introduce further evidence, even after the close of the argument; and the exercise of that discretion is not revisable.—*Carter v. Wilson*, 434.
14. *Charge*; when properly refused.—The court is not bound to modify or reform instructions requested; and if asked in terms which may mislead, or require explanation or modification, they may be refused. *Ladd v. Dubroca*, 251.
15. *Lost instrument*; rule as to proof of contents.—As a general rule, where the loss of a written instrument is sought to be proved, its loss should be shown, before allowing evidence of its contents; but it rests in the sound discretion of the lower court to modify, or change, the rule in a particular case.—*Conoly v. Gayle*, 116.
16. *Order of introducing evidence*, ruling as to; what not erroneous.—Proponent was a witness, as to the loss of the will, and contestant, on cross-examination, exhibited a copy of a bill in chancery, filed and verified by her prior to that time, which she made affidavit to, knowing it averred that decedent died intestate. By agreement of counsel, it was expressly understood that this copy was to be read in evidence, but contestant declined to do this, until proponent closed her evidence; and thereupon the court, at proponent's instance, required the copy to be read then,—*held*: not error.—*Ib.* 116.

PRINCIPAL.

See SURETY.

RAILROADS.

1. *Case adhered to.*—The court adheres to its decision in *State, ex rel. Harrell, v. Mobile and Montgomery Railway Company*, 59 Ala. 325, that the second section of the act of April 19th, 1874, which provides that railroad companies "may for the transportation of local freight, demand and receive not exceeding fifty per cent. more than the rate charged for the transportation of the same description of freight, over the whole line of its road,"—does not authorize the addition of fifty per cent. on the charge over the whole road, irrespective of the distance the freight may be carried, but only an additional fifty per cent. more per mile, for the distance local freight is carried, than the per mile rate charged on goods carried over the whole line.—*M. & M. R. Co. v. Steiner, McGehee & Co.*, 559.
2. *Act of April 19th, 1873, construed.*—The rate on freight "*carried over the whole line of its road*," which furnishes the basis for the additional fifty per cent. allowed by that act, for the transportation of "local freight," is the rate charged on freight taken on at one terminus and discharged at the other; and not the rate for freight brought from or carried to a point beyond the termini of the road.—*Ib.* 559.
3. *Same.*—The rate which furnishes the basis on which local freight charges must be graduated, is the rate prevailing at the time of the shipment; and rates at any particular time in the past furnish no reliable guide for ascertaining present rates.—*Ib.* 559.
4. *Corporation formed under act to constitute the purchasers of a railroad, &c., a body corporate; rights and powers of.*—When the purchasers of a railroad form a corporation under the provisions of the statute—act "to constitute the purchasers of any railroad heretofore sold under authority of any law of this State, a body corporate and politic," approved December 17th, 1873, and amended March 20th, 1875—the new corporation succeeds to the franchises, faculties and powers of the old corporation precisely as surrendered or lost; though as to ownership of property and liabilities, it is a new corporation.—*Ib.* 559.
5. *Effect of acceptance of restrictions on corporate power not embodied in charter.*—If a railroad corporation, though originally chartered without restrictions as to the right to fix tolls, accepts a limitation or restrictions of such powers, on a valuable consideration—*e. g.*, as one of the conditions on which it receives aid from the State—such limitation inheres in its organic law, precisely as if originally incorporated therein; and a new corporation, formed by those purchasing its property, &c., under our statutes, succeeding only to the rights of the old, is bound by such limitations.—*Ib.* 559.
6. *Imposition of penalty; when not invasion of chartered rights.*—Where a law, when a corporation is formed, or which it afterwards accepted, exacts certain duties of it, a subsequent statute imposing a penalty, where none existed before, for a failure to perform such duties, does not impair any corporate right or otherwise violate the constitution. *M. & M. R'y Co. v. Steiner, McGehee & Co.* 559.
7. *Voluntary payment; what not.*—The nature of the business considered, the shipper does not stand on equal terms with the carrier, in contracting for charges for transportation; and if the shipper pays the rates established in violation of law by the carrier, rather than forego services, such payment is not voluntary, in the legal sense, and the shipper may maintain his action for money had and received, to recover back the illegal charge.—*Ib.* 559.
8. *Constitution of 1868; effect of, as to power to amend charter.*—The act to constitute the purchasers of any railroad, &c., a body politic and corporate, having been enacted since article 13 of the constitution of 1868 became operative, and it, and similar provisions in the present constitution providing that the general laws, under which corporations may be framed, may be amended, altered or repealed, corporations thus formed are subject to legislative control.—*Ib.* 559.

RAILROADS—*Continued.*

9. *Act of April 19th, 1873; penalties imposed by, not repealed.*—The penalties imposed by act of April 19th, 1873, are not repealed by the provisions of the "act to prevent excessive charges by railroad companies," approved March 17th, 1875.—*Ib.* 559.
10. *Effect of act repealing "act to furnish the aid and credit of the State of Alabama, for the purpose of expediting construction of railroads within the State."*—The repeal of the act under which the aid and credit of the State were extended to railroads, upon the conditions therein recited, does not have the effect to release them from the restraints imposed by the fifteenth section of that act as to tolls and charges; nor to release the Mobile and Montgomery Railroad Company, to whose rights the appellant succeeded, from the restrictions imposed by section eight of the special act, under which the Mobile and Montgomery Railroad Company obtained State aid.—*Ib.* 559.
11. *Negligence; what fixes charge of, on railroad company.*—The failure to ring the bell or blow the whistle on the starting of the train, as required by the statute, fixes the charge of negligence on a railroad company; and any one injured thereby may recover damages for the injury, unless his own negligence or fault has disabled him from making complaint.—*M. & C. E. R. Co. v. Copeland*, 376.
12. *Contributory negligence; what will defeat recovery.*—Plaintiff's intestate got off a passenger train of defendant, which had just arrived in a small incorporated town, and attempted to crawl between two cars of a freight train standing on a side track, with locomotive attached and steam up, ready to start, which stood between him and the depot. Those in charge of the freight train did not see him, and backed it without giving proper signals, just as he got between the cars,—*held*: The conduct of the deceased can not be classed less than negligence, bordering on recklessness, and contributed proximately to his death, and his personal representative can not recover, though defendant was negligent in not giving proper signals before its train started—the injury not having been inflicted wantonly or intentionally.—*Ib.* 376.
13. *Corporation; what duty owes employes, in selection of fellow-servants.* A railroad corporation owes a duty to its employes, to exercise due care and diligence in the selection and appointment of their fellow-servants, and is answerable for injuries resulting from its want of care or skill, in these respects; though if these have been observed, it is not responsible to one servant, for injuries resulting from the negligence of his fellow-servant.—*Tyson v. S. & N. A. R. R. Co.* 554.
14. *Same; delegation of power of appointment, effect of.*—Whoever exercises the power of appointing and removing employes or servants, though his grade of employment as to other matters, makes him their fellow-servant, exercises a corporate function; and though he be ever so competent himself, and due care has been exercised in selecting him for that purpose, his negligence or mistakes in selecting employes, are the negligence or mistakes of the corporation, for which it must answer.—*Ib.* 554.

RECEIPT.

SEE ACTION.
PAYMENT.

RECEIVER.

1. *Receiver; when evidence as to necessity of appointing, will not be closely scrutinized.*—Where the mortgagor who agreed, in the mortgage, to insure the property, pay taxes, and keep it in repair, failed to do so, and was shown to be insolvent, this court will not closely scrutinize conflicting evidence, as to the value of the mortgaged premises, upon which a receiver was appointed.—*Eslava v. Crampton*, 507.

SEE CHANCERY, 3.

REDEMPTION.

1. *Redemption; confessed judgment, not available to defeat.*—Our statutes prohibit the use of a confessed judgment to a purchaser, who is resisting redemption of the debtor's property sold under judicial process, as well as to a creditor who is seeking to redeem it.—*Mobile Mutual Insurance Co. v. Steele*, 253.

REFERENCE.

See CHANCERY, 11.

REGISTER.

1. *Register acting as judge; what record should show.*—When the register in chancery assumes the jurisdiction conferred by statute, where the probate judge is incompetent, the record should affirmatively show the facts which authorize its exercise,—bare recitals in the orders made by him, is an irregular mode of disclosing it.—*Thornton v. Moore*, 348.
2. *Same; duties of.*—When the judge of probate is a creditor, having a claim filed against an insolvent estate, he becomes incompetent, not only as to that claim, but as to the entire administration: and whatever of judicial duty is to be performed in reference to it, must be performed by the register.—*Ib.* 348.

REMOVAL OF CAUSE.

1. *Removal of suit to Federal Court.*—Under the twelfth section of the judiciary act of 1789, as also under the act of Congress of 1867, a suit could not be removed from the State to the Federal court unless all the parties on one side are residents, and all on the other side non-residents of the State in whose court the suit is brought.—*Ex parte Grimball*, 598.
2. *Same.*—Whether the act of Congress of July 27th, 1866, as to the removal of suits from State to Federal courts, is repealed by the later act of March 3d, 1875, is not decided; but the court treats the present application as though both statutes were in force.—*Ib.* 598.
3. *State court, power and duty of on petition for removal.*—The jurisdiction of the State court is not *ipso facto* ousted by the filing of the petition and bond for removal; the court must examine the petition, in connection with the cause to which it relates, to determine whether the cause and the petitioner's connection with it, entitle him to the removal, and it is not until this is ascertained that the jurisdiction of the State court ends.—*Ib.* 598.
4. *Case; what not removable.*—M. died leaving lands and personalty here, managed by C., trustee, under the will, with authority to pay over the net income of the share of testator's daughter to her, or to her husband if she married. She married G., (who resides in New York,) and died domiciled there, intestate and childless. The trust property was claimed by Mrs. G.'s brothers and sisters under the will; also by R. as Mrs. G.'s administrator, who claimed adversely to them; G. claimed the property under the laws of New York. C., the trustee, who resided in Alabama, filed his bill in the State court against G., R., Mrs. G.'s administrator, and her brother and sisters, and others for a settlement of the trust, and for instructions how to dispose of the trust estate. G. was the only non-resident, and he made application to have the cause removed to the Federal court,—*held*:
 1. There is no act of Congress which authorized the removal.
 2. G. can obtain his distributive share of the wife's personalty, only through R., the administrator, who is an indispensable party, and the controversy of G. is not only with him, but also with G.'s other co-defendants, who claim adversely both to G. and the administrator, all of whom are residents of Alabama except G.; hence the case is not

REMOVAL OF CAUSE—*Continued.*

"a controversy which is wholly between citizens of different States, and can be fully determined between them," and can not be removed under the act of Congress of 1875, upon the petition of one of several defendants; and not being a suit to restrain or enjoin G., and his controversy being really with G.'s co-defendants mainly, which can not be disposed of without their presence, the cause is not removable under the act of Congress of 1866.—*Ib.* 598.

REVIVOR.

See that title, under PLEADING AND PRACTICE.

REVIEW—BILL OF.

See CHANCERY, 6.

SALE.

See VENDOR AND PURCHASER.
TAXES.

SET-OFF.

1. *Commercial paper; what defenses may be made to.*—The indorsee of commercial paper acquiring it after maturity, or before maturity merely as collateral security for a pre-existing debt, takes it subject to all the defenses which the maker could prefer against the payee, if he had remained the holder; and this right exists as to matters of set-off and discount, as well as to defenses affecting the instrument itself.—*Pres't Bank of Mobile v. Poelnitz*, 147.
2. *Set-off; what does not destroy right of.*—One of several joint debtors is entitled to set-off a debt due to him alone from the common creditor, when sued upon the joint debt.—*Ib.* 147.
3. *Same; when resort can not be had to equity, to enforce.*—A surety on a promissory note on which the payee or endorsee brings an action at law, can not go into equity to enjoin the action and to obtain the benefit of a set-off, when such set-off was due at the commencement of the action, and is of such a nature as to be made available at law, without embarrassment or difficulty; and the fact that the payee is insolvent is immaterial, and furnishes no ground for resort to equity.—*Ib.*

SHERIFF.

See CHANCERY, 17.
DAMAGES.

STALE DEMAND.

1. *Stale demand; rule as to.*—Where a claim is sought to be enforced, *prima facie* within the operation of the rule against stale demands, the complainant should show by positive and specific allegations, some act or recognition of the party sought to be charged, within the period which will take the case out of the rule; mere general and vague averments of facts and circumstances, out of which the right sought to be enforced arises, or on which recognition of it is sought to be based, will not suffice.—*Phillippi v. Phillippi*, 41,
See SURETY, 5.

SUPERSEDEAS.

See ERROR AND APPEAL, 22.
GARNISHMENT.

STATUTES AND CODE OF ALABAMA.

1. *Repugnant statutes in same Code; how construed.*—Where repugnant statutes are incorporated in the same Code, the original statutes, their

STATUTES AND CODE OF ALABAMA—*Continued.*

- dates, and even their judicial interpretation will be consulted, to ascertain the legislative intent.—*Steele v. State*, 213.
2. "Act supplementary to corporation laws of Alabama," approved November 18th, 1863; effect of.—*Cahall & Pond v. C. M. B. Ass'n*, 232.
 3. Code, § 540 of, what case does not fall within.—*Gill v. State*, 169.
 4. Code, § 2149; construed.—*Turner v. McFee*, 405.
 5. Code, § 2574; construed.—*Thornton v. Moore*, 351.
 6. Code, § 2849; what plea good under.—*Goetter, Weil & Co. v. Pickett*, 367.
 7. Code, §§ 2879, 2997; construed.—*Alexander v. Caldwell*, 543.
 8. Code, § 2908; revivor.—*Brown v. Tutwiler*, 374.
 9. Code, § 2948; construed.—*Jones v. Morris*, 518.
 10. Code, § 4130; construed.—*Wilson v. State*, 150.
 11. Code, § 4203; construed.—*Ivey v. State*, 58.
 12. Code, § 4204 *et seq.*; construed.—*Ulmer v. State*, 208.
 13. Code, § 4205; requisites of requisition.—*Bain v. State*, 75.
 14. Code, § 4398; construed.—*Daniel v. State*, 5.
 15. Code, § 4417; construed.—*Johnson v. State*, 9.
 16. Code, § 4450; what repeals.—*Steele v. State*, 213.
 17. Code, § 4917; costs.—*Greene County v. Hule County*, 72.
 18. Code, §§ 4978, 4992; construed.—*Ex parte Knight*, 483.

SURETY.

1. *Surety; what creates the relation of.*—Where parties desiring to purchase parts of a tract of land, of unequal quantities, but not unequal in value except as to the difference in quantity, procure one of them to purchase the entire tract in his name, they joining in the note for the purchase-money—all are jointly and severally bound as principals to the vendor; but as between themselves, each is principal only for the share of the purchase-money he was bound to pay, and a surety for the remainder.—*Owen v. McGehee*, 440.
2. *Contribution; right to.*—The right to contribution, where one discharges more than his just share of a common burden, does not necessarily arise from contract, but has its foundation in natural justice; the principle applies not only to the relation of principal and surety, but to that of original contractors, and whenever parties stand in a relation in which equality of burdens is equity between them.—*Ib.* 440.
3. *Same; right to share in benefits acquired by person bound to contribute to another.*—Wherever persons stand in such relation to a common burden, that contribution between them will be compelled, neither can speculate on the common liability, and whatever benefits or advantages are acquired by one in dealings with the common creditor, enure equally to the benefit of all.—*Ib.* 440.
4. *Same.*—A co-surety who gives his individual note to the common debtor, who accepts it in payment and compromise of the debt, is entitled to contribution from the other sureties for their *pro rata* share, though he afterwards became insolvent, and failed to pay the note to the common debtor.—*Ib.* 440.
5. *Contribution, delay in enforcing; when not bar to.*—Contribution may be refused to a surety, when his conduct has been such as to work injustice or injury to the principal or co-sureties; but when injury has not been produced by delay, and lapse of time has not worked a bar, mere passiveness in asserting his right, will not prejudice a claim to contribution.—*Ib.* 440.
6. *Administrators; effect of judgment as to sureties.*—A creditor can not maintain an action at law on the bond of an administrator, until his debt or demand is first reduced to judgment or decree, by a court of competent jurisdiction; and such judgment, in the absence of fraud, is conclusive against the sureties, as to the existence of the debt.

SURETY—*Continued.*

Whether or not the judgment would have that effect against sureties subsequently joining the administrator in the execution of an additional bond, is immaterial, when they do not controvert the existence of the debt, and the only purpose for which the judgment is offered, is to prove its existence, and the duty of the administrator, resulting therefrom, to apply assets coming into his hands for the satisfaction of the debt.—*May v. Kelly*, 489.

See COSTS, 4.

TAXES.

1. *Tax sale; when void.*—Under the revenue law of 1868, the tax-collector had no authority to sell lands for non-payment of taxes, until after advertisement showing, among other things, the name of the owner when known, &c.; and where lands were given in for assessment and assessed against the true owner, an advertisement describing them as belonging to an entirely different person, confers no authority to sell, and the purchaser at such sale does not acquire title. *Milner & Co. v. Clarke*, 258.
2. *Adverse possession; when commences under tax title.*—If a purchaser at tax sale of lands, enters into possession under the purchase before the delivery of the deed, *bona fide* claiming title, his possession is adverse from its inception, and not merely from the date of the delivery of the deed; though its delivery may be necessary to constitute color of title. *Ladd v. Dubroca*, 25.

TELEGRAPHIC MONEY ORDER.

See PAYMENT, 2.

TENDER.

1. *Plea of tender; what insufficient.*—Where the purchaser of lands conveyed under the mortgage sale, brings ejectment against the mortgagor, the latter's plea that, before suit was brought, and within the time prescribed by statute, he tendered the amount required to redeem,—the plea not being accompanied by deposit with the clerk of the amount tendered—presents no defense to the action, and should be rejected, on motion.—*Alexander v. Caldwell*, 543.

TRESPASS.

See CRIMINAL LAW, 69, 71.

TRUST AND TRUSTEE.

See GUARDIAN AND WARD.

• EXECUTORS AND ADMINISTRATORS.

USURY.

1. *Usury; how must be set up.*—One who has made usurious payments on a debt, can not obtain credits therefor, unless he distinctly and correctly sets forth in the pleadings, the terms and nature of the usurious agreement, and the amounts of the payments.—*Munter & Faber v. Linn*, 492.
2. *Same; what allegations not sufficient to put in issue.*—A mortgagor who, upon dispute with the mortgagee as to the amount due, files his bill to ascertain the mortgage indebtedness, and for a sale of the property, if necessary for its payment—does not by the general allegation that “from time to time he has made various payments” on the mortgage debt, which reduce it below the amount the mortgagee claims, put in issue the right to credits for payments, beyond eight per cent. per annum, made to the mortgagee not as credits on the debt, but for forbearance, and to induce him not to foreclose, after the debt matured. *Ib.*, 492.

USURY—*Continued.*

3. *Same.*—Nor in such a case, is the defect of the bill cured, by a consent decree directing the register "to state an account of the amount due the mortgagee upon the mortgage debt, allowing him eight per cent. interest upon the debt after maturity, and deducting therefrom all sums of money paid the mortgagee at the date of the several payments." Such decree, when tested and construed with reference to the pleadings, relates only to payments made as such, on the debt, and not to usurious exactions paid merely for forbearance.—*Ib.* 492.
4. *What will not render mortgage usurious.*—A stipulation in the mortgage, that the mortgagor, in addition to legal interest, shall pay to the mortgagee attorney's fees incurred in collecting the debt, will not render the agreement usurious; but a reasonable amount only can be collected, though a larger sum or per cent. is agreed on.—*Ib.* 492.
5. *Brokerage in addition to interest; when will not render loan usurious.* Where a loan is negotiated through a broker, who, by arrangement with the borrower, received commissions for effecting the loan, the fact that the broker allowed the lenders to share in such commissions, in order to induce them to take the loan, will not brand the transaction as usurious, when it is shown that such action on the broker's part was a mere gratuity, and not part of a scheme to avoid the laws against usury.—*Estava v. Crampton*, 507.
6. *Usury; what will not avoid.*—A mere renewal of the debt or change of securities, between the same parties, will not purge the usury; and where one shown to have already loaned money to complainant at usurious rates, takes another loan and security, which she assails as a mere renewal of the old usurious debt with change of security, he must make good his defense by clear and satisfactory proof, that the second transaction was not part of a device to avoid the usury laws.—*Ib.* 507.

VENDOR AND PURCHASER.

1. *Abatement of purchase-money of land; when may be claimed.*—Where by the terms of a contract of sale of lands, the price is fixed or regulated by the quantity, and there is a material mistake as to the real quantity, the vendee is entitled to compensation for the deficiency; or when sued for the purchase-money, may claim compensation by way of abatement from it.—*Winston v. Browning*, 80.
2. *Same; when can not be claimed.*—Where, however, the contract is not for the sale of a specific quantity of land, but for the sale of a particular tract, or designated lot or parcel, by name or description, for a sum in gross, and the transaction is *bona fide*, a mutual mistake as to quantity, but not as to boundaries, will not entitle the purchaser to compensation, and is not ground for rescission.—*Ib.* 80.
3. *Failure or defect of title; when not available to defeat recovery of purchase-money of land.*—In the absence of fraud, mistake, or warranty, defect or failure of title in the vendor, is not available to the vendee to defeat or abate recovery for the purchase-money of lands.—*Tobin & Bell v. McMahon*, 125.
4. *Same.*—B. purchased a lot, taking the agreement of R., who professed to be agent of the owner, to procure a conveyance. B. endorsed on the agreement that the purchase was made for T.'s benefit, and authorized a conveyance to him. T. afterwards sold this lot, and two others to which he had title, to B., agreeing upon payment of the deferred installment of purchase-money, "to return the original title papers," properly endorsed to B. No fraud or mistake occurred. R.'s authority was repudiated, no title could be obtained to the third lot, and B., who entered under the contract with T., was evicted. The value of the other two lots, the title to which was not disputed, did not exceed the cash payment, while the value of the third equalled the

VENDOR AND PURCHASER—*Continued.*

amount of the deferred payment,—*held*: T. was entitled to enforce a vendor's lien for the whole amount of the purchase-money, against the other lots.—*Ib.* 125.

5. *Vendor's lien; resulting trust what does not create.*—One who advances money to the vendee to pay the deferred payment on a purchase of lands, or pays the amount, at the vendee's request, to the vendor who conveys to the purchaser, has no vendor's lien on, or resulting trust in the lands.—*Chapman v. Abrahams*, 108.
6. *Vendor's lien; what not bar to enforcement of.*—In the absence of any agreement to the contrary, the vendor retains a lien on lands for the unpaid purchase-money, though he has made an absolute conveyance in fee to the vendee, and put him in possession; and the fact that the debt, as a mere legal demand, is barred by the statute of limitations, is no bar to the enforcement of the lien in equity.—*Flinn v. Barber*, 530.

WILLS.

1. *Will; what does not vitiate.*—Irrelevant recitals will not vitiate a will, and if it be duly attested by the requisite number of subscribing witnesses, the fact that another of the subscribing witnesses was incompetent to prove its execution, is entirely immaterial.—*Conoly v. Gayle*, 116.
2. *Will, construed.*—Testator died seized of certain lands, leaving two sons legatees and devisees under the will, which was duly probated. The will devised and bequeathed to each of the sons, John and James, one-half of the estate, real and personal, for the term of their natural lives, with provision that if either died before arriving at age, or without lawful issue, the estate should go to the surviving brother. The will further provided, that the portion of the estate which shall be allotted to John, should "be sold by his guardian according to law, (the will not nominating any,) and the funds placed at interest." The executors named in the will, qualified, and they were appointed guardians of John, by the Probate Court. The executors, under order of the Probate Court, purchased lands of one Broxen, pursuant to a parol contract made by the testator, taking title to the heirs as such. John afterwards died intestate of full age, without lawful issue. The guardians, without order of any court, sold all the right, title and interest of John in all the lands,—*held*:
 1. The will did not authorize the guardians to sell the interest or share of John in the Broxen lands.
 2. Their sale of John's interest in the lands devised was also void—the will contemplating a sale only after division, and then under order of a court of probate or equity.—*Jones v. Morris*, 518.

WITNESS.

1. *Witness; competency of.*—The exception to the competency of witnesses, as declared by statute, (Code, § 3358,) relates to "transactions with, or statements by a deceased person," whose estate is interested, &c., and does not disqualify a legatee or devisee, under a will propounded for probate, from testifying as to other matters connected therewith; hence, when such person is offered as a witness, a general objection to his competency can not be entertained; but objection should be made to such testimony as infringes the rule declared by the statute.—*Conoly v. Gayle*, 116.
2. *Witness; how may be impeached.*—The character of a witness may be impeached, by the testimony of a person who three years before and previously lived in the same neighborhood with him, and knew his past and present general reputation and character there, though such person

WITNESS—*Continued.*

- knows nothing of them in another neighborhood, to which the witness removed, and where he then resided.—*Kelly v. State*, 19.
3. *Age of witness; what evidence of admissibility.*—A witness may testify to his own age, though he states that his knowledge is derived from what his mother told him; and the fact that his mother, who was not shown to be dead, or out of the jurisdiction of the court, was not introduced, does not affect the admissibility of the evidence, though the jury may consider it, with the other circumstances of the case, in determining its credibility.—*Bain v. State*, 76.
 4. *Sustaining witness.*—It is error to allow a witness, who confesses having written the forged instrument under the direction and at the request of the prisoner, to write in the presence of the court and jury a similar instrument, for the purpose of comparison between the two, or to sustain such witness, when impeached.—*Williams v. State*, 33.
 5. *Expert, opinion of; when admissible.*—A physician and surgeon of "long experience with gun-shot wounds, and an expert in such matters," who saw the body of the deceased shortly after she received a wound, may give his opinion as to how it was inflicted.—*Rush v. State*, 80.
 6. *Same.*—One who had been in the late war, and "saw the range of balls in a good many gun-shot wounds, but was not a physician or a surgeon, or an expert," can not be permitted to testify as to "how the balls range, and some of the wounds which the witness had seen." *Ib.* 89.
 7. *Same.*—A medical man, though not personally cognizant of the facts, may give his opinion as to the result of a wound or the cause of death, upon the facts proved on the trial; but where the facts are disputed, he can not give his opinion on the case on trial, but must be examined hypothetically, and his opinion on the state of facts which the jury regard as proved, then becomes evidence.—*Page v. State*, 16.
 8. *Same.*—Not only the cost of erecting a mill and placing machinery in it, but also their enhanced value by reason of location, other circumstances, and the general patronage and profits derived from it, may be considered in determining the value of the mill; and a person shown to be conversant with these matters, may give his opinion as to value.—*Hudson v. State*, 334.
 9. *Evidence; what not admissible to refresh recollection.*—Entries upon the tax books, not made by the owner, or under his direction or authority, showing the assessed value of a mill, are not admissible for the purpose of refreshing his memory, as to who returned the property for taxation, or the amount at which it was assessed.—*Ib.* 334.

WRIT OF ERROR.

See CRIMINAL LAW, 63.

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